Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1695

UNIFICATION CHURCH
Petitioner,

v.

ATTORNEY GENERAL
OF THE UNITED STATES

KEIKO ASAI, *et al.*
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirms the decision of the United States District Court for the District of Columbia and which sustained final orders of deportation by the Board of Immigration Appeals.

OPINIONS BELOW

The opinion of the court of appeals was rendered on March 1, 1978 and is unreported, and is set forth in Appendix at pp. 1a-18a. The opinions of the District Court are unreported and are set forth in the Appendix at pp. 19a-26a and 27a-33a.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1978, Appendix A, pp. 1a-18a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in adjudicating petitions to permit the training of alien missionaries in the United States, the Immigration and Naturalization Service, consonant with the Free Exercise of Religion Clause of the First Amendment, may determine whether a religious organization has an "established and realistic training program" or if it is "appropriate for the purpose for which it is intended?"

2. Whether the refusal to approve a missionary training program upon the grounds that it is "too scholastic", is not "firmly established", has an "improper ratio of field experience to classroom instruction", is not "uniform", is "unnecessary", not "useful", and involves "excessive fund raising", is an interference with a church's right to the free exercise of its religion and is a violation of the First Amendment?

3. Whether in reviewing an administrative decision by the Immigration and Naturalization Service which has relied upon many factors relating to the "administration, the development, need, effectiveness, and utility of a bona fide training program" to determine that the program is not bona fide, the court of appeals may, upon the authority of *Kleindienst v. Mandel*, 408 U.S. 753 (1972), modify one of the findings and convert it into a "threshold," "facially legitimate and bona fide reason" in order to sustain the administrative finding?

4. Whether the modification of the administrative findings and the failure to judge the grounds upon which the administrative order was based is in conflict with *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1942)?

5. Whether the fact that a religious body relies upon fund-raising to support its trainees in the United States may, consonant with *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1942), be used as a basis for determining that the training program is not bona fide where the administrative regulations preclude consideration of the "source of any remuneration received by a trainee and whether or not any benefit will accrue to the petitioner?

6. Whether in circumstances where the Immigration and Naturalization Service permits commercial and industrial employers to obtain approval of training programs regardless whether the trainees are engaged in "productive employment," the denial of petitions for a training program by a religious body upon the ground that trainees will be engaged in fund-raising is a permissible discrimination against a religious institution?

7. Whether the procedures for adjudicating the petitions for the approval of a training program have conformed with the administrative regulations where the district director, who is vested

with responsibility to make the initial decision, has failed, as required by the regulation, to permit the petitioner "to inspect and rebut" "any evidence not submitted by the petitioner" "when an adverse decision is proposed" and when the "denial decision of the district director" has failed to "set forth the pertinent facts adduced from the evidence considered and give(n) the specific reasons for the decision in the light of the facts"?

8. Whether the failure to comply with the specific terms of the administrative regulations may be regarded as not "prejudicial" where it is found that the regional commissioner, who functions in an appellate capacity, has "fulfilled his obligations," not withstanding the fact that the regional commissioner failed to remand the case to the district director and failed to "set forth the pertinent facts adduced from the evidence considered" in rendering an adverse decision?

9. Whether procedures, which permit a district director to deny an application for an extension of stay in the United States, without an interview, a hearing, findings of fact, or an opportunity to submit supporting evidence; give conclusive effect to the district director's decision in a deportation proceeding; and bar the immigration judge from determining whether the applicant is a bona fide nonimmigrant and not subject to deportation, conform with Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1251(b), and meet the requirements of due process for deporting an alien from the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Section 101(a)(15) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a)(15), provides:

> "The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens -
>
> (H) an alien having a residence in a foreign country which he has no intention of abandoning . . .(iii) who is coming temporarily to the United States as a trainee; . . . ."

Section 214 of the Act as amended, 8 U.S.C. 1184, provides in part:

* * *

> "(c) The question of importing any alien as a nonimmigrant under section 101(a) (15)(H) or (L) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be

construed as establishing that the alien is a nonimmigrant."

Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b), provides, in part:

"(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and. . . shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry offficer. . . . Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that -

1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive

procedure for determining the deportability of an alien under this section."

8 C.F.R. 103.2(b)(2) (1974 ed.) provides in pertinent part:

"(2) Inspection of evidence. An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as hereinafter provided. If the decision will be adverse to the applicant or petitioner on the basis of derogatory evidence considered by the Service and of which the applicant or petitioner is unaware, he shall be advised thereof and offered an opportunity to rebut it and present evidence in his behalf before the decision is rendered, except that classified evidence shall not be made available to him. Any explanation, rebuttal, or evidence presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding. A determination of statutory ineligibility shall not be valid unless based on evidence contained in the record of proceeding. In exercising discretionary power when considering an application or petition, the district director or the officer in charge, in any case in which he is authorized to make the decision, may consider and base his decision upon information not contained in the record and not made available for inspection by the applicant or petitioner, provided the regional commissioner has determined that such information is classified under Executive Order No. 11652 of March 8, 1972 (37 F.R. 5209, March 10, 1972; effective June 1, 1972), that it is relevant to the disposition of the case and, in his

discretion, has concluded that its disclosure would be prejudicial to the national security and safety. If the decision of the district director or officer in charge is based in whole or in part upon information not contained in the record, the decision shall so state and cite the authority therefor."

8 Code of Federal Regulations 214.2(h)(4)(1974 ed.) provides:

"(4) Petition for alien trainee - (i) General. In addition to purely industrial establishments, an individual, organization, firm, or other trainer may petition for nonimmigrant trainees on Form I-129B for the purpose of giving instruction or training in agriculture, commerce, finance, government, transportation, and the professions.

(ii) Productive employment. The source of any remuneration received by a trainee and whether or not any benefit will accrue to the petitioner are not material, but a trainee shall not be permitted to engage in productive employment if such employment will displace a United States resident. . .

(iii) Description of training. There shall be attached to each petition for a trainee a statement describing the kind of training to be given and setting forth the proportion of that time that will be devoted to productive employment; the number of hours that will be spent respectively in classroom instruction, and in on-the-job training without supervision; the position or duties for which this training will prepare him; the reason why such training cannot be obtained in

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the alien's country, and why it is necessary for the alien to be trained in the United States."

• • •

8 Code of Federal Regulations 214.2(h)(6)(1974 ed.) provides:

"(6) Decision. In adjudicating the petition, the district director shall consider all the evidence submitted, and such other evidence as he may independently require or procure to assist his adjudication. If an adverse decision is proposed on the basis of any evidence not submitted by the petitioner, he shall be so notified before a final decision is made and invited to inspect and rebut such evidence. The petitioner shall be notified of the decision and, if the petition is denied, of the reasons therefor and of his right to appeal in accordance with the provisions of Part 103 of this chapter. A denial decision of the district director shall set forth the pertinent facts adduced from the evidence considered and give the specific reasons for the decision in the light of the facts and the relating provisions of section 101(a)(15)(H) of the Act."

STATEMENT

H-3 Petitions by Unification Church for the Training of Missionaries

The Unification Church,[1] also known as The Holy Spirit Association for the Unification of World Christianity, is an interfaith religious movement, begun in 1954 and now established in approximately 40 countries, with an international membership in 1974 of 500,000 to 1,000,000, including 10,000 members in the United States, of whom 3,000 were full-time missionaries operating from 10 regional headquarters in the United States. In developing its worldwide evangelical program, the Church established centralized facilities at Tarrytown and Barrytown, New York to train missionaries. The United States was selected as the place for the training particularly because of the freedom of religion in this country and of the interreligious, multiethnic and interracial character of its population, as well as because of the growing universal use of the English language by people throughout the world. Church, J.A. 4, 14, 23-27, 47-75, 100-111.

Because the membership of the Church was predominantly in foreign countries and its missionaries were to be brought to the United States for training, the Church sought to comply with the relevant immigration laws. After obtaining advice from officers of the Immigration and Naturalization Service[2] regarding the appropriate method for bring aliens to the United States to participate in a missionary training program, Church officials in

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[1] Hereafter referred to as the Church.

[2] Hereafter referred to as INS.

1972-73 undertook a program to assist selected foreign missionary trainees to obtain B-1 or B-2 nonimmigrant visas from various American Consuls abroad.[3] Asai, R. 143.

Each applicant abroad was furnished a letter of invitation by the Church to be submitted to the appropriate Consulate, stating that he/she was coming to the United States for training with the Church, that the Church would be responsible for the support of the trainee, that the first phase of the training program would be six months, and that selected trainees would be eligible for further phases of the program. Church, J.A. 139-140. No mention of the ultimate time required for any additional training was made in the original letter. Church, J.A. 144.

B-1 or B-2 nonimmigrant visas were issued by American consular officers in various countries pursuant to these arrangements for approximately 600 missionary trainees sponsored by the Church. Asai, R. 113.

In January 1974, INS representatives suggested the desirability of obtaining clarification of the various categories of immigration status that had been used for the admission of the missionary trainees. Following discussions between INS representatives and officials of the Church, it was agreed, at the suggestion of INS, that the Church should file a pilot petition for the approval of H-3 trainee status for one of its missionary trainees. Church, J.A. 24-25.

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[3]In implementing 22 C.F.R. 41.25 governing the issuance of B-1/B-2 immigrant visas, the Foreign Affairs Manual of the State Department states that an alien is classifiable as B-1 if he is "A minister of religion desiring to proceed to the United States to engage in an evangelical tour, who does not plan to take appointment with any one church, and who will be supported by offerings contributed at each evangelical meeting. . . ." (Volume 9-Visas, 22 C.F.R. 41.25, Par II, 4.4(g), Foreign Affairs Manual).

In accordance with this understanding, the Church filed a visa petition on February 11, 1974 on behalf of one missionary trainee, Herman Ten Bokkel Huinink. Subsequently, the Church filed three other petitions, one for 574 missionary trainees, another for three missionary trainees, and the third for five missionary trainees. The petitions and the supporting exhibits indicated that the training program would consist of instruction in Christianity, the philosophy and principles of the Unification Church, comparative religion, leadership training, church business practice, and field experience in missionary activities. Church, J.A. 5, 25, 44-75, 90-116.

On April 4, 1974, the district director denied the H-3 petition for Herman Ten Bokkel Huinink on the grounds that the training program was "inadequately described," that it was "more appropriate to a scholastic . . . than to a training program", that field training in "fund raising by solicitation on the street. . . is. . . not usually found in bona fide training situations" and did not entail adequate supervision to prevent possible abuse and ruled that the proposed training program is not "contemplated by the pertinent section of the Act." The decision was certified to the regional commissioner for review. Church, J.A. 2, 5-6, 76.

On review before the regional commissioner, the Church contended that the statute, as implemented by the administrative policy, provided for instruction in any "field of endeavor", necessarily including the field of religious endeavors; that the Church had complied with the requirements of 8 C.F.R. 214.2(h)(4)(iii) for a description of the proposed training program; that the district

director's finding that the program was improperly "scholastic" is artificial; that his findings regarding fund-raising are based on evidence not disclosed to the Church and are contrary to the substantial evidence in the record indicating that the fund-raising is incidental to the full range of the field experience in missionary activity, which included witnessing, street preaching, classroom lecturing, seminars, revival tours by international, interreligious, and interracial teams; and that there was close supervision of all fund-raising activity. Church, J.A. 6-8, 77-89.

On oral argument before the regional commissioner, the Church was informed for the first time that the record upon which the district director's decision had been based included "adverse information" regarding the solicitation of funds. No opportunity had been provided prior to the district director's decision to inspect or rebut that evidence. Church, J.A. 9, 80.

The regional commissioner, relying also on INS reports not included in the record or made available to the Church, affirmed the district director's decision on May 20, 1974. He:

> "stated at the outset that it is neither our intention nor desire to take issue with the principles upon which the Unification Church was founded, to question the intense devotion which its members have shown to their spiritual leader, or to challenge the trainees' wholehearted dedication to the work of the church and the lay missionary duties which they have assumed. We are only concerned in this proceeding with determining whether the petitioner has an established and realistic training program, if it is appropriate to accomplish the purpose of which it is intended, and whether it is in conformity with the immigration laws and regulations." App. 89a.

In his decision, the regional commissioner found that there was no established training program, that the ratio of classroom to practical training was unrealistic, that the training was unnecessary in view of prior experience of the intended missionaries, that the program was designed primarily for fund raising and was excessive, that the Church had not shown that it could support the trainees, and that if the program were approved, the Service would surrender control over the alien trainees.

In conclusion, the regional commissioner found "that the training program which was proposed by the (Church) is unrealistic and unacceptable." App. 94a. On May 23, 1974 the district director denied the three remaining petitions, involving 582 missionary trainees, based upon the regional commissioner's decision. Church, J.A. 9, 10, 77-89.

On the second appeal to the regional commissioner, in addition to its earlier challenge of the district director's original decision, the Church contended that the evidence substantiated the fact that there is an "established training program;" that the objection to the ratio of class studies to training is arbitrary and capricious; that the findings that the trainees were already experienced missionaries is factually wrong; that the findings regarding the fund raising activities conducted by the Church disregarded the substantial evidence in the record, are an impermissible discrimination against the religious activities of the Church in the light of INS approval of fund raising activities of

commercial and industrial establishments that are permitted to use trainees in income-producing functions, and is in conflict with 8 C.F.R. 214.2 (h) (4) (iii); that the Church had shown by substantial evidence that it has sufficient assets and income to support the missionaries while undergoing their training in the United States; and that the information sought by INS regarding the individual trainees was not required by the administrative regulations or the prescribed form until following the approval of the H-3 petition, when the trainee, pursuant to 8 C.F.R. 248, seeks to change his nonimmigrant status in the United States. Church, J.A. 10-13, 136-143.

On August 21, 1974, the regional commissioner affirmed the district director's denial of the petitions. He doubted the credibility of the income statements submitted by the Church, reasserted his belief that the training program was unrealistic and not "established" and that the Service would not be able to control the training, acknowledged that Service regulations precluded consideration of the source of a trainee's remuneration but held the regulation "did not envision the unique circumstances which presently confront us," suggested that the missionary trainees might be regarded as engaging in productive employment, doubted that the training would be useful to the trainees, held that "it has not been satisfactorily established that the nature and amount of training which it is proposed to accord the beneficiaries in this country will actually prepare them to perform their missionary functions abroad," and concluded that the training program "is not within the provisions of the statute or regulations." App. 71a.

The Church thereafter on September 10, 1974 sought judicial review[4] of the regional commissioner's decisions,

[4] The action was brought under the Administrative Procedure Act 5 U.S.C.701 prior to this Court's ruling in *Califano v. Sanders*, 430 U.S.99 (1977).

challenging them upon the grounds, *inter alia*, that the decisions were made in violation of the requirements of the administrative regulations, erroneously interpreted the relevant sections of the Immigration and Nationality Act, and that, to the extent that the decisions were based upon the intended instructional and training activities as missionaries of the Unification Church, are a violation of the Free Excercise Clause of the First Amendment.

On cross-motions for summary judgment, the district court found it necessary to consider only one of the grounds raised by the complaint: the failure of the district director to comply with the provisions of 8 C.F.R. 103.2 (b)(2) (1974) and of 8 C.F.R. 214.2 (h)(6) (1974), requiring disclosure of derogatory evidence to the petitioner with an opportunity of rebuttal before a final decision is made. The district court found that the INS had not complied with the "affirmative duty . . . to proffer the information to the petitioner for his inspection" and remanded the case to the regional commissioner to be reopened "to provide (the Church) the opportunity to inspect and rebut the adverse information." In its memorandum opinion, the court stated that the INS "must then reconsider its denial of all four petitions", and entered an order remanding the case to the "Regional Director" *(sic)* holding the motions for summary judgment in abeyance "pending the receipt of the new decisions by the Regional Commissioner". App. 33a.

On remand, the regional commissioner "reopened" the cases "so that adverse information may be presented to the petitioner for examination and the matters thereafter reconsidered on the basis of representations made in rebuttal." Order of regional commissioner, May 2, 1975; Church, J.A. 149-150. In the reopened proceedings, the

regional commissioner failed to reopen the original decisions rendered by the district director and to remand the cases to that officer to permit compliance with 8 C.F.R. 214.2 (h)(6), which seemed to be intended by the purport of the district court's memorandum opinion. Instead, he made various materials available for examination, but left the examiner to speculate which of the "mass of undifferentiated statements and reports" had been relied upon in rendering the adverse decisions. The regional commissioner also declined to accord the Church the availability of the procedures set forth in 8 C.F.R. 103.2 (b) which are customarily relied upon by INS in obtaining evidence, including rebuttal evidence, in the determination of applications and petitions. See exchange of letters, Carliner-Regional Commissioner, September 3-8, 1975. Church, J.A. 151, 152-153, 154.

Pursuant to permission granted by the regional commissioner, the Church made "representations" that even the "adverse evidence" in the files of the INS, read fairly and in the context of the full investigative reports regarding the activities of Church members, established that the missionary teams were, in fact, attempting to utilize their educational training in working as missionaries in "international, inter-religious, and interracial living situations, that they engaged in 'witnessing', street preaching, and support activities for revival tours, as well as fund raising unique to the Unification Church through the offerings of tea, flowers, candles, peanuts, and candy . . . (and) that the method of fund raising has religious overtones. . . ."Church, J.A. 155-176.

On January 15, 1976, the regional commissioner concluded that his prior "decision was proper" and that the material submitted in rebuttal of adverse information does not establish a basis for overruling that decision; that the

Church has not met the "burden imposed . . . by regulation," citing *Matter of Brantigan*, 11 I & N Dec. 493 (B.I.A. 1966); and that it has not "shown that the (challenged) decision is without a rational basis or that it is arbitrary, capricious, or an abuse of discretion." App. 34a, 44a.

On July 27, 1976, the district court again considered cross motions for summary judgment and, finding that the Attorney General is "entitled to judgment as a matter of law", granted his motion for summary judgment. In its memorandum opinion, the district court found that the regional commissioner "acted within his prerogative in not referring the petitions to the district director for an initial decision . . . (i)n the absence of regulation specifically providing for such a procedure on remand." The court also found that although the district director "did not specify which items of derogatory information he relied upon," the "access to the entire administrative file" afforded to the Church and the "some measure of specificity" set out in the Regional Commissioner's decisions were "legally sufficient and afforded (the Church) full apprisal of the information and materials relied upon by the Service." App. 27a - 33a.

The district court rejected the Church's contention that the Attorney General exceeded his statutory authority in imposing requirements upon the Church which are not mandated by the statute and dismissed the Church's claim that the "attempt to supervise and control (its) missionary training activities (as being in conflict) with the free exercise clause of the First Amendment" with the statements that "no argument has been advanced that the Service has interfered with or restricted the rights of United States citizens to pursue their personal religious beliefs. Incidental restrictions, if any, on alien individuals' rights to the

free exercise of their chosen religion resulting from defendant's enforcement of the immigration laws were insubstantial and outweighed by the necessity for enforcement of said law". App. 25a

On appeal, the District of Columbia Circuit affirmed the decision of the district court. It held that the failure to remand the case to the district director to comply with the requirements of 8 C.F.R. 103.2 (b) (2) and 214.2 (h) (6) was not prejudicial error; that the finding "essentially" of the regional commissioner that "the Church was not training the intended beneficiaries of its H-3 petitions at all, but was using them to solicit funds to support the Church" could not be said to be an abuse of discretion, but was merely a "legitimate threshold determination that the Church's training program was not bona fide;" and that the actions of the INS did not amount to "imposing standards for the conduct of a religious training program," citing *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972). App. 1a - 18a.

Deportation Proceedings Against Asai

After the denial of the H-3 petitions by the New York district director and the initial affirmance of the denial by northeast regional commissioner, Asai filed an application for the extension of her stay in the United States "to complete (her) mission for the Church." Asai, R. 189. The district director denied her application on September 5, 1974, stating as his reason that she "failed to establish that the purpose for which (she) was admitted has not been accomplished and that (her) requested extension is not merely an attempt to prolong (her) stay indefinitely."

Asai, R. 170.[5] She was instructed "to depart the United States not later than September 20, 1974." Asai, R. 170.

No interview, no hearing, no opportunity was afforded to Asai to establish that the purpose for which she was admitted to the United States had not yet been accomplished and that she had no purpose to "prolong her stay in the United States indefinitely." Asai, R. 42-45.

When Asai failed to leave the United States, an order was served upon her to show cause why she should not be deported upon the ground that she had remained in the United States beyond September 20, 1974, without authority. Asai, R. 155.

At her deportation hearing, Asai denied that she was "authorized to remain in the United States only through September 20, 1974" and that "she remained in this country thereafter without authority," (Asai, R. 102), claiming that she had been brought to the United States as a B-1 nonimmigrant under arrangements originally suggested by the INS officials, and that she was to be permitted to remain in the United States pending the "final adjudication" of the H-3 petition on her behalf. Testimony was admitted into the record that the purpose for which she, among other trainees, had come to the United States had not yet been accomplished, specifically that her training program was for a period of two years, that it had not

[5]Suggestions had been made by INS officers that missionary trainees of the Unification Church had "engaged in services and activities which were deemed by the Service to be in violation of their status." (Asai, R. 129; See also letter dated February 13, 1974, Maurice Kiley, Acting District Director to Assistant Regional Commissioner for Travel Control, Church, J.A. 156), but this ground was not adverted to the denial of the extension nor was it alleged subsequently as a basis for deportability. Asai, R. 155, 170.

yet been completed, (Asai, R. 138-142) and that there was no plan or intention by her to remain in the United States indefinitely. Asai, R. 142.

The immigration judge, relying upon *Matter of Sourbis*, 11 I & N Dec. 335 (B.I.A. 1965), ruled that he does not have "jurisdiction to make any determination as to the propriety of the district director's decision" to require Asai to leave the United States by September 20, 1974, (Asai, R. 80-81); and basing his decision solely upon the district director's order, found the petitioner's deportability "has been established by clear, convincing, and unequivocal evidence." Asai, R. 78, 85.

The Board of Immigration Appeals agreed, holding that regardless whether the district director's decision ordering Asai to leave the United States "may be arbitrary, capricious, or unwarranted, does not confer authority over the area to the immigration judges . . . . Issues as to whether an overstay was justified are not germane to the questions of the alien's deportability under Section 241 (a) (2)" and that regardless of "any promises by the Service" to permit Asai, among other missionary trainees to remain in the United States pending adjudication of their petitions, the "decision by the Service as to when to commence prosecution of these deportation proceedings is a prosecutorial decision which is not reviewable by the immigration judge. . . and which has no bearing on the immigration status of the respondents (Petitioners)." App. 5b-6b.

In its review of the order of deportation, the court of appeals held that "petitioner's deportation hearing did not lack due process." App. 17a.

As the predicate for its decision, the lower court held that "the granting of an extension (of stay in the United

States to a nonimmigrant) is . . . a political decision committed to executive discretion, and is conceptually analogous to the original granting of a visa." Citing its own prior decision in 1929, *United States* ex rel. *Ulrich v. Kellogg*, 30 F. 2d 984, 986, cert. denied, sub nom. *United States* ex rel. *Ulrich v. Stimson*, 279 U.S. 868 (1929), involving an alien not within the United States, the Court held that "due process of law requires no hearing if an application for visa is denied."

Since the petitioner was a lawfully admitted alien at the time of her application for an extension of the period of her temporary stay, the Court held that,

> "the requirements of due process were met in these circumstances by the availability of judicial review under the Administrative Procedure Act to determine if the district director's decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'
>
> Since the district director's denial of the petitioner's application did not violate due process, neither did the immigration judge's reliance upon it. . . . (Citations omitted) App. 17a.

REASON FOR GRANTING THE WRIT

Preliminary Statement

The treatment accorded to the Unification Church, as indicated in the decision below, as well as in other decisions which have been set forth in Appendix, 1c-2f. fairly indicates that the Unification Church has been given treatment by the Immigration and Naturalization Service which is reminiscent of the conduct of state and local governments in an earlier generation toward the Jehovah's Witnesses. The result then was a series of historic decisions by this Court affirming the First Amendment right of free exercise of religion of persons who are not of "orthodox religious faiths".

What permeates all of the decisions by the regional commissioner here, and of the INS generally, is a barely concealed intention to deny the petitions and applications of the Unification Church and their members upon any and all grounds possible. The findings are bizarre: a missionary must be a "person who labors to spread the Gospel, especially among a neglected population. . . . and (because) we cannot conscientiously consider the United States as a neglected population, religiously speaking. . . ;" an application for permanent residence by a missionary in this country cannot be approved (App. 6c); "the responsibilities and duties of a missionary with the Unification Church. . . might be associated with any person who is active with and supportive of his Church. . . .(Since the applicant). . . has not distinguished himself in any way from the rank and file membership of the church. . . " he is not eligible for classification as a missionary (App. 1f); a missionary is one who "carries religious messages to lands and peoples not of own faith to win converts and establish native churches. Provides educational, nursing and other services. . .(and that

because). . . the mission of beneficiaries (of an H-3 training program) will be to win converts only, without providing any apparent benefit to those they wish to convert. . .," the application cannot be approved (App. 3d); because the training program is for a "profession", in order for a missionary to qualify for training as a missionary, he must show that he has "attained knowledge or learning---not merely skills---of an advanced type in the 'missionary' field of related religious studies, gained by prolonged course or specialized instruction and study of at least a baccalaureate level, which is a realistic prerequisite to entry as an H-3 trainee into the missionary field of endeavor" (App. 5d).

With decisions such as these being rendered by district directors, regional commissioners, and immigration judges of the Immigration and Naturalization Service, it seems of compelling importance for this Court to review the decision below, if today's objects of governmental hostility are to be given the protection which is afforded under our Constitution for free exercise of religion.

Two substantial constitutional questions, touched upon in previous decisions by this Court but never before decided, are raised by the ruling of the District of Columbia Circuit — one affecting the First Amendment right to the free exercise of religion by a Church under the Immigration & Nationality Act;[6] the other, the nature of the process due to aliens, lawfully admitted as nonimmigrants, who are expelled from the United States.

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[6] A similar question regarding the application of the National Labor Relations Act to schools operated by The Roman Catholic Church is pending argument before this Court in *National Labor Relations Board v. The Catholic Bishop of Chicago, et al.*, No. 77-752.

Petitions by Unification Church

The crux of the first issue appears in the principal decision rendered by the regional commissioner stating the INS criteria in adjudicating the petitions filed by the Church for the training of its alien missionaries in the United States:

> "We are only concerned in this proceeding with determining whether the petitioner has an established and realistic training program, if it is appropriate to accomplish the purpose for which it is intended, and whether it is in conformity with the Immigration laws and regulations." App. 89a.

It must be indisputable that the decisions of this Court forbid such intrusion in the conduct of a missionary training program by a religious denomination. *Wolman v. Walter*, 433 U.S. 229 (1977); *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 748 (1976); *Meek v. Pittenger*, 421 U.S. 385, 395-96 (1975; *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); and *Walz v. Tax Commission*, 397 U.S. 664 (1970).

In its attempt to preserve a decision which, on its face, involves the most "excessive governmental entanglement with religion" possible *(Meek v. Pittenger*, op. cit., at 538), the Court below held that it "need not reach the question of whether the INS" has 'authority to pass on the administration, development, need, effectiveness, and utility of a bona fide training program.' App. 8a. Instead, it relied upon an elliptical construction of one of the many findings made by the regional commissioner to uphold the administrative decision that the training program was not "bona fide."

(A) The holding by the court below that "the actions of the INS in this case did not amount to. . . an intrusion. . .(in). . . the conduct of a religious training program" and that "the commissioner merely made a legitimate threshold determination that the Church's training program was not bona fide" involves the question whether this Court's opinion in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), has been properly applied here. See also *Cantwell v. Connecticut*, 310 U.S. 296 (1939), invalidating a statute that vested power in a secretary of a public welfare council to grant authorization to make solicitations if he found that a cause was "religious," "bona fide", and "conformed to reasonable standards of efficiency and integrity."

The First Amendment rights of professors who "wish(ed) to hear, speak, and debate" with an alien who was ineligible for admission to the United States were only "implicated" in *Mandel*. 408 U.S. at 765. The petitioner here, however, has a direct First Amendment right to be free from intrusion in its religious training program by a government agency acting upon its petition to train alien missionaries in the United States. Moreover, whereas in *Mandel*, this Court reviewed the exercise of "discretion" under 8 U.S.C. 1182 (d)(3), not otherwise defined, in refusing to admit an alien into the United States "temporarily despite his inadmissibility," the right of the Unification Church to obtain INS approval of its training program for alien missionaries who seek to enter the United States[6] is derived from statutory pro-

[7] There is no issue here regarding the admissibility of the alien trainees. 8 U.S.C. 1184 (c) states, "The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant." The case here is also distinguishable from *Mandel* because the petitioning professors there were seeking to obtain a determination of the alien's admissibility rather than, as here, the nature of the religious training program offered to the trainees. It would be as if in *Mandel*, the Attorney General would have been vested with the power to determine the nature of the forum in which the professors would hear, speak, and debate with Mandel.

visions which authorize the Attorney General to determine "petition(s) of the importing employer" "after consultation with appropriate agencies of the Government", and to define the conditions under which an "alien as a nonimmigrant" shall be admitted to the United States to be prescribed by regulations. 8 U.S.C. 1184 (a), (c).

By contrast with *Mandel*, where this Court did not resort to a judicial reconstruction of the reasons given by the Attorney General to preserve his basis for a negative excercise of discretion in order to sustain the administrative decision, the court below was required to ignore most of the administrative findings, to enlarge and modify the regional commissioner's findings regarding fund-raising, and then to elevate one of his many reasons to be a "legitimate threshold determination." App. 9a.

In view of the fact that the decision below is bottomed upon the holding of this Court in *Mandel*, a review of the applicability of *Mandel* to circumstances in which the exercise of discretion is circumscribed by regulation is warranted here. Such review is impelled especially because it is the religious training program of the Unification Church which is at issue here, rather than the admissibility of the alien trainees to the United States.

(B) It has been a familiar rule, often cited, variously applied, but never disturbed, since *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87, 88 (1942) that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action is based," unless the decision "already made . . . should properly be based on another ground within the power of the appellate court to formulate." *National Labor Relations Board v. Pipefitters*, 429 U.S. 507, 522, 555, N. 9 (1976).

The record here indicates that the lower court indulged in more than a grammatical construction of the administrative decision where it stated, "Essentially, the commissioner found that the Church was not training the intended beneficiaries of its H-3 petitions at all, but instead was using them to solicit funds to support the Church," citing the record at J.A. 88, 180. App. 9a.

The regional commissioner made no such finding at Church, J.A. 88, App. 92a-93a. He stated:

> "We have also considered the issue of the petitioner's inclusion of fund raising--which encompasses the outright sale of merchandise--as part of the trainees' field experience. We do not dispute the right of any recognized religious or charitable organization, including the instant petitioner, to lawfully engage in the solicitation of funds. However, the employment of nonimmigrant aliens for such purpose is not consistent with B-1 or B-2 status, or with the stated intention of the pending H-3 petitions. Even conceding arguendo that instruction in fund raising is important to a missionary's training, the manner and extent to which the instant beneficiaries have been utilized towards that end transcends the normal limits of training.
>
> We have considered the necessity for fund solicitation in the light of the fact that the petitioning church--with total membership of 10,000 of which 7,000 have been described in oral argument as "associate members"--has committed itself to the support of the 575 H-3 beneficiaries, in addition to other nonimmigrants who have been admitted for training, for a period in excess of two years. No evidence

has been furnished to substantiate the petitioner's financial ability to assume this obligation and even the basic information relative to its gross annual income has been omitted from Item 4 of the petition, Form I-129-B. At the time of oral argument, the petitioner's representative advised that the church would not entertain any suggestion that fund raising be eliminated as part of the training program. Despite the assertion that such solicitations are only a small part of the overall field experience, information received from various Service officers throughout the United States substantiates that the beneficiaries have been widely and repeatdly engaged in such pursuit. We are led to the inescapable conclusion that the petitioner's current training program, which calls for three times as much field work as formal study, has been designed primarily for fund raising rather than for training purposes." App. 92a-93a.

However the above statement of reason given by the regional commissioner may be read, there is no language in it which justifies a judicial construction that "the commissioner found that the Church was not training the intended beneficiaries of its H-3 petitions at all, but instead was using them to solicit funds to support the Church."[8]

[8]The opinion by the court of appeals seems contradictory. In holding that the action here was not moot, the court held that "there is no evidence in the record whether any beneficiaries of the Church's H-3 petition have, in fact, begun, much less completed, the proposed training program."App. 6a, fn.5. How the fund-raising activities of "many of the beneficiaries--as well as other aliens not currently covered by an approved pending H-3 petition--" App. 4a, may be invoked to determine the bona fides of a proposed training program when there is no evidence in the record that the beneficiaries had begun the program is not explained.

Neither do the views set forth by the regional commissioner at Church, J.A. 180 (App. 40a) support the lower court's construction of his findings. As pertinent here, the decision states:

> "We contend that the evidence of record submitted by the Petitioner fails any reasonable test to substantiate a viable training program within the interpretation of law for the 20 months of practical experience for 583 beneficiaries. A good portion of the trainees' activities must be viewed as productive employment. This presumption is not contingent on the beneficiary receiving a salary, only that he is performing the day-by-day duties that are necessary in the operation of the Petitioner's endeavors. The record establishes these functionary duties are being performed by the 583 beneficiaries under consideration. We submit that the evidence does not require a highly skilled interpretation to reach this conclusion."

This finding is not at all a conclusion that the trainees' activities are "essentially fund-raising." All that is said is that "a good portion of the trainees' activities must be regarded as productive employment." Even that employment is described as "the day-by-day duties that are necessary in the operation of the petitioner's endeavors" and described as "functionary duties." Since the record establishes that one of the purposes of the training program is to create "an international, interreligious, interracial living situation, both at the training center and in the field experience", Church, J.A. 106, the functionary duties necessarily included those daily activities which are required for housekeeping in a living situation, including the housing, feeding, transportation, and provision of personal needs for the participants.

In any event, reliance upon the ground that the activities of the missionary trainees is "productive employment" is precluded by the administrative regulation. 8 C.F.R. 214.2 (h) (4) (ii) explicitly provides with regard to productive employment: "(W)hether or not any benefit will accrue to the petitioner (is) not material. . . ." All that is precluded is that "a trainee shall not be permitted to engage in productive employment if such employment will displace a United States resident," a contention not made here.

The disposition which the court below gave to the administrative decision seems clearly to be in conflict with the rule established by *Chenery*. Not only did the gloss which the court applied to the findings transmute them, but the court ignored the fact that the findings, whether as originally made or modified, are based on considerations forbidden by the administrative regulations. Cf. *National Labor Relations Board v. Pipefitters*, op. cit. Although this problem is familiar and recurrent in judicial review of administrative decisions and perhaps, standing alone, would require no renewed special attention by this Court, it is suggested that in the circumstances here, where fundamental constitutional freedoms have been impinged upon by the administrative agency, the review of this particular issue by this Court is warranted especially because of the frequent decisions by the Immigration and Naturalization Service in questions relating to religious occupations.[9]

[9]In FY 1976, 1,387 "religious workers" were beneficiaries of occupational preference petitions or admitted otherwise as immigrants based upon their religious occupation. One hundred ninety-six were admitted as temporary workers. Annual Report, Immigration and Naturalization Service, 1976, pp. 57, 97. No statistics are set forth for the number of alien religious workers denied admission or for petitions and applications involving religious training programs or religious educational institutions. Cf. 8 C.F.R. 214.3 (b) which set forth requirements for the approval of educational institutions for the attendance of nonimmigrant students. Among other requirements, unless an institution

Continued

Decisions on each of these applications, rendered initially and sometimes finally by an INS district director, acting for the Attorney General, involve the exercise of religious freedom in the country.[10] Illustrations of recent rulings are set forth in Appendices C-F.

Footnote 9 continued
is owned and operated as a public educational institution or is listed by the Office of Education as an "accredited" institution, it must submit evidence that "it confers upon its graduates recognized bachelor, master, doctor, professional, or divinity degrees, of if it does not confer such degrees that its credits have been accepted unconditionally by at least three institutions of higher learning. . . (that meet the accreditation requirements)." These conditions effectively preclude virtually all post secondary religious educational institutions except those which are recognized theological seminaries preparing students for the ministry. In addition, the regulation precludes the approval of "avocational" institutions.

[10] The decisions, it is worth noting, are of a piece. While a variety of reasons have been set forth for denials, as in the petition here, there is a uniformity of result which suggests the purpose on the part of INS to deny all applications and petitions filed by members of the Unification Church, regardless of their merit. (App.1c-2f). Especially relevant here is a letter, with *Accardi v. Shaughnessy*, 347 U.S. 260 (1953), implications of prejudgment, by the acting New York district director to the assistant regional commissioner for travel control in the northeast region. The letter which concerns the first H-3 petition filed here, was written *prior* to the decision required to be made by the district director and states: "The attached petition and supporting documents are forwarded for your advice and guidance inasmuch as the matter is somewhat controversial in nature." Church, J.A. 156. Although the letter refers to "numerous instances" of solicitation of funds by B-1 or B-2 nonimmigrants, there is no further explanation why the matter would be "somewhat controversial." As noted elsewhere, fund raising is permitted to B-1 ministers engaged in evangelical tours. (See Infra at p.28). While there may have been uncertainty regarding INS policy, this type of doubt does not usually rise to the threshold of a "controversy."

One which is now pending before the INS central office is a decision by the western regional commissioner in which an application for permanent residence by a missionary was denied on the ground, among others, that because "Christianity is the dominate (sic) religion in the United States," "missionary activities in this country, can only be considered as 'proselytism,' " a missionary being required "to be a person that (sic) labors to spread the Gospel, especially among a neglected population. . . . (S)ince we cannot conscientiously consider the United States as a neglected population, religiously speaking," the applicant could not be regarded as a missionary within the meaning of 29 C.F.R. 60.7, Schedule A, Group III(b). App.6c.

Inasmuch as INS rulings dealing with religious occupations have never before been addressed by this Court, the administrative practice, as exemplified below and illustrated by numerous other decisions not easily susceptible to judicial scrutiny, warrants review because of the sensitive and substantial constitutional questions involved. Cf. *Murdock v. Pennsylvania*, 319 U.S.105 (1942) and the series of decisions in its wake involving Jehovah's Witnesses who were subject to the same treatment that the record here reflects has been given to members of the Unification Church in their proselytizing efforts in various places. Church, J.A. 155-176.

(C) A further question, the ultimate one, as framed by the court of appeals, is the right of a religious body in the United States to use its alien missionaries to engage in fund-raising.

The program conducted by the Unification Church is not unlike that described and affirmed as a First Amendment right in *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1942):

"Petitioners spread their interpretations of the

Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. They claim to follow the example of Paul, teaching "publickly, and from house to house." Acts 20:20. They take literally the mandate of the Scriptures, "Go ye into all the world, and preach the gospel to every creature." Mark 16:15. In doing so they believe that they are obeying a commandment of God.

The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the orthodox and conventional exercises of religion. It also has the same claim as the others to guarantees of freedom of speech and freedom of press."

The court of appeals regarded analogous activities[11] by the intended beneficiaries of the H-3 petitions here as a justifiable determination that "the Church's training program was not bona fide." App. 9a. The predicate of the regional commissioner's finding, which the court of appeals did not stop to examine, covered a wider ambit. Each basis of the decision by the regional commissioner raised additional constitutional and other questions regarding the free exercise of religion insofar as they involve fund-raising.

(1) The regional commissioner reached "the inescapable conclusion that the petitioner's current training program. . . has been designed primarily for fund raising rather than for training purposes." He based his conclusion upon what he regarded as the "necessity for fund solicitation in the light of the fact that the petitioning Church -- with a total membership of 10,000 of which 7,000 (are) 'associate members' -- has committed itself to the support of the 575 H-3 beneficiaries, in addition to other nonimmigrants who had been admitted for training, for a period in excess of two years." App. 92a.

Even were it so that the evidence which the regional commissioner has relied upon to hold that the training program "has been designed primarily for fund-raising," his conclusion that it was necessary in order to support the 575 beneficiaries appears contrary to the teachings of this

[11] The record indicates that the trainees were engaged in a program of "witnessing, street preaching, and lecturing," including the request of offerings for the Church in exchange for such items as tea, flowers, candles, peanuts, and candy, which were said to be symbolic of Church doctrine. (Church, J.A.83, 85-86). The regional commissioner characterized the transactions as the "outright sale of merchandise." (App. 92a) Cf. *Murdock v. Pennsylvania*, op. cit. at 111: "The mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."

Court in the cases involving "peddling or selling" of literature and religious objects by evangelical and other religious groups:

> "It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defer his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion, are available to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania*, Id. at 111.

See also *Follett v. McCormick*, 321 U.S. 573, 577 (1943):

> "Freedom of religion is not merely reserved for those with a long purse."

The thrust of these opinions by the Supreme Court, although relating to licenses and taxes imposed upon persons selling religious literature, raises a substantial doubt regarding the administrative decisions that a training program for alien missionaries is other than bona fide if the missionary trainees are engaged in fund-raising activities to support themselves.

(2) Apart from the question whether the need for the missionary trainees to support themselves and to help finance the Church renders their training program not bona fide, the decisions here are in conflict with the administrative regulations. In his final decision denying the Church's H-3 petitions, the regional commissioner stated that he could consider the "alien's activities which result in a source of income for the Petitioner, when, as in this instance, money is directly generated by the beneficiary-trainee and the Petitioner has designated such soliciting to

be encompassed in his program." App. 42a.

However, 8 C.F.R. 214.2 (h) (4) (ii) states: "Productive employment: The source of any renumeration received by a trainee and whether or not any benefit will accrue to the petitioner are not material."

(3) The violation of the regulation here is discriminatory against religious institutions in view of the fact that under the regulation, INS approves such petitions submitted by commercial and industrial firms which receive income derived from the services which the trainees perform for their employers. The fact that the Church is engaged in religious activity, with no resulting marketable merchandise to finance its missionary movement, should not be used to disfavor it when commercial and industrial establishments are permitted to use the income producing activities of their trainees both for wages for the trainees and for profit. The effect of the regional commissioner's decision is to discriminate against institutions that do not produce products, sell merchandise or perform services but must engage in "fund-raising." Cf. *Murdock v. Pennsylvania*, op. cit. at 115: "Freedom of press, freedom of speech, freedom of religion are in preferred position."

(4) The application of the regulations here also result in a discrimination against religious workers who are not "duly authorized ministers" of a "recognized religious sect or denomination 'exercising duties usually performed by a regularly ordinated pastor or clergyman." The Immigration and Naturalization Service will permit such persons to be "maintained through offerings," but "lay preachers. . . . cantors, lay brothers, or nuns" and, *a fortiorari*, missionaries may not seek such offerings. App. 71a; 22 C.F.R. 42.25.

That such a discrimination is in conflict with the settled decisions of this Court seems plain. See *Follett v. McCormick*, op. cit. at 576, 577; *Fowler v. Rhode Island*, 345 U.S. 67 (1952).

The questions suggested above are of obvious constitutional import and justify review by this Court.

(D) *Accardi v. Shaughnessy*, 347 U.S. 260 (1953), long ago established the principle for the Immigration and Naturalization Service, and applied generally, that an administrative agency must comply with its own regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *United States v. Nixon*, 418 U.S. 683 (1974).

There can be no doubt that INS failed to comply with its regulations for the adjudication of the present H-3 petitions. The circuit court held that it was unnecessary to decide this question[12] (App. 6a-7a) because the Church has not been prejudiced, citing 8 C.F.R. 103.1 (m)(11),103.3.

That the issue is not simply formalistic is underscored by the differences between the administrative process for a decision made by the district director and for the one made by the regional commissioner on appeal.

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[12] The court of appeals misstated the procedural issue raised here. The issue was not whether "it was error for the district court not to have remanded the case to the district director" rather than to the regional commissioner. No issue is made of the district court's remand to the regional commissioner. What was error, the Church contended, was the failure of the regional commissioner, after remand, to order reopening of the proceedings before the district director in order to overcome the district director's prior failure to comply with 8 C.F.R. 103.2 (b)(2) and 214.2 (h)(6).

8 C.F.R. 103.1(m)(11) delegates to regional commissioners only "appellate jurisdiction" of various decisions, including petitions for temporary workers or trainees. At 103.3, the regulations state that "[a]n appeal, cross-appeal, answers thereto and accompanying brief, if any, shall become part of the record of proceeding . . . ." Subsection (c) provides for oral argument, but makes no reference, as would be expected in hearings before appellate bodies, for the submission of additional evidence. The procedures specified for the appellate jurisdiction of the regional commissioner are to be contrasted with those for district directors who are granted authority "under the executive direction of a regional commissioner" to adjudicate the grant or denial or any application or petitions submitted to the Service. 8 C.F.R. 103.1(n). It is in connection with the determinations by the district director, not those of the regional commissioner, that the provisions of 8 C.F.R. 214.2(h)(6) come into play, as the regulation explicitly states. Similar language appears at 8 C.F.R. 103.2(b)(2).

The regional commissioner's decision is not *de novo*, being a review on appeal. The decision he made here tellingly notes the difference. In reconsidering his own prior decision on remand from the district court, the regional commissioner held that the standard which the Church was required to meet is to show that it,

> "has met the burden imposed . . .by regulation . . .or that (challenged)decision is without a rational basis or that it is arbitrary, capricious, or an abuse of discretion." App. 44a.

Although the regional commissioner has stated that "petitioner has not met the burden imposed upon him by regulation," that reference in the context of the regulations

necessarily relates to the evidence submitted to the district director, not to any independent submission to the regional commissioner. The regional commissioner's statement that the Church has not shown that the "challenged decision" is without a rational basis or that it is arbitrary, capricious, or an abuse of discretion," is derived, of course, from the usual standard for judicial review of administrative decisions. It is obviously out of place here, where the Church has established by the district court's first ruling (App. 27a-32a) that the initial decision by the district director, never vacated, was improperly reached. Since the rulings below have denied to the Church the right assured by 8 U.S.C. 1101(a)(15)(H)(iii) and 8 C.F.R. 214.2(h)(4)(6) to have an initial decision on its petition made by the district director, with the opportunity to rebut adverse evidence, without a tilting hand put on the regional commissioner's scale of justice by a prior unfavorable decision, it can scarcely be said that the procedures used here were not prejudicial.

The court of appeals also found that the regional commissioner "has fulfilled his obligations under the regulations when . . .he has made available to the (petitioner) the entire file and can reasonably claim to have based his decision that the Church's missionary program was in actuality a means of fund solicitation rather than a bona fide training program on the 'overall import of the evidence considered.' " App. 7a-8a.

However, the relevant regulation, 8 C.F.R. 214.2(h)(6), imposes the obligation upon the "district director . . . (to) set forth the pertinent facts adduced from the evidence considered and (to) give the specific reasons for the decision in the light of the facts . . . ."

It seems obvious that the purpose served in vesting this obligation upon the district director is not merely to require him to make a reasoned decision based upon factual findings but to provide a basis for review on appeal. By merging the functions of the district director and the regional commissioner here, the court of appeals has, in effect, deprived the Church of the procedures afforded by the administrative regulations for a properly rendered de novo decision made by the district director and its review by the regional commissioner.

Given the other important questions presented in this petition, it is suggested that the failure of the court of appeals below to hold the INS to compliance with its regulations is appropriate for review by this court.

Deportation Proceedings Against Asai

Since the *Japanese Immigrant Case*, 189 U.S. 86 (1903), it has been settled that there is no power:

> "to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." 189 U.S. at 100, 101.

The holding of the District of Columbia Circuit that despite the fact that Asai was denied "all opportunity to be heard upon the questions involving her right to be and remain in the United States" before the immigration judge in her deportation hearing, nonetheless "re-

quirements of due process were met . . . by the availability of judicial review . . . [13] is in conflict with the leading decisions of this Court in *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 91 (1913) and in *Southern Railway Company v. Virginia*, 290 U.S. 190 (1933).

In *Southern Railway Company*, the statute gave the highway commissioner, an executive officer, power to direct the construction of grade crossings, without notice or hearing, when, in his opinion, it was necessary for public safety and convenience, permitting the corporation commission to approve or to modify construction plans. Although the statute authorized judicial review for "arbitrary actions," this Court invalidated the procedure, holding "there is nothing to indicate what the Court would deem arbitrary action or how this could be established in the absence of evidence or hearing." 290 U.S. at 194, 198.

The decision is also in conflict with *Mahler v. Eby*, 264 U.S. 32, 36, 45 (1924). *Mahler* invalidated a deportation warrant because the Secretary of Labor failed to fulfill the requirements that he find "after hearing" that an alien, convicted of specified offenses, is an "undesirable resident of the United States". 264 U.S. at 36. This Court held there, "when an administrative agency is required as a condition precedent to an order to make a finding of facts, the validity of the Order must rest upon the needed finding. If it is lacking, the Order is ineffective." 164 U.S. at 45. Obviously, the need to make a finding *after hearing*

[13] The reference by the court of appeals to the Administrative Procedure Act as the source of jurisdiction has been undermined by the recent holding of this Court in *Califano v. Sanders*, 430 U.S. 99, 105 (1977), decided a year before before the District of Columbia Circuit decision.

cannot be met if the hearing is given only *after the finding* by a reviewing court on judicial review.

It is no answer to say that the requisite finding is made, as here, if the hearing and subsequent finding are limited solely to the questions, whether a decision was rendered by the district director permitting Asai to remain in the United States only until September 24, 1974 and whether she has remained beyond the date authorized.

This view of the nature of a due process hearing invites the question whether the procedures applied by the Board of Immigration Appeals and upheld by the District of Columbia Circuit comply with the principle adopted by this court in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327 (1945). The court below distinguished *Ashbacker* because it is said to have concerned "a statutory interpretation of conflicting sections of the Federal Communications Act . . ." while here, there is no "contradiction between 8 U.S.C. 1184(a) authorizing the Attorney General to admit nonimmigrants for such time as he may by regulations prescribe, and 8 U.S.C. 1252(b) requiring that special inquiry officers conduct proceedings to determine the deportability of aliens."

The lower court shifted Asai's claim for relief from a request that the court "pass on the validity of INS' interpretation of its own regulations making these decisions, reached without the opportunity for a hearing, binding on an Immigration Judge during a deportation hearing," (App. 16a) to one that, "it disturb the regulation" established by the Attorney General to authorize district directors to decide whether extensions should be granted. (App. 17a). The latter request was not made by Asai, but only that the regulations be harmonized to meet the constitutional and statutory requirements of a due process hearing,[14] that is, one which is "fair," *Sung v. McGrath,* 339 U.S. 23, 40 (1950) and "meaningful," *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

Setting aside the incorrect rationale relied upon by the court of appeals, the distinction which it cited does not appear to make a legal difference to the merit of Asai's request to construe the regulations to afford her a full hearing before an immigration judge. In *Ashbacker,* this Court held "while the statutory right of the petitioner to hearing. . .has, in form been preserved, it has, as a practical matter, been substantially nullified by the grant of the . . .application . . ." to the competing applicant. 326 U.S. at 334. The two competing applicants in *Ashbacker* at least had hearings, although separate, before the same licensing body. Here, Asai has had no hearing, no opportunity to be heard before the director who denied her application to remain in the United States; the hearing before the immigration judge was more circumscribed than the hearings in *Ashbacker,* there being no "jurisdictional bar" to the consideration of Ashbacker's application. Here, conclusive effect has been given to the district director's denial of Asai's application for an extension of her stay in the United States.

Assuming that the two regulations adopted by the Attorney General are in actual conflict, the question whether the *Ashbacker* rule is intended to be constricted only to situations in which there is a statutory interpretation of conflicting sections of an act of Congress but not to an interpretation of conflicting regulations adopted by the Executive obviously is a major question affecting the right of due process in administrative hearings. The specific issue here is of critical importance, of course, to aliens who are subject to deportation proceedings as a result of findings and decisions made by district directors acting without any of the elements of due process. Cf. *Immigration and Naturalization Service v. Stanisic,* 395 U.S. 62 (1965),

[14] Brief for petitioners below, pp. 19-21. Reply Brief, 10-11.

in which this Court recognized "the distinction between a determination whether an alien is statutorily deportable --something never contested by respondent (contrary to Asai's challenge here) -- and a determination whether to grant political asylum to an otherwise properly deportable alien." Cf. *Pierre v. United States*, 547 F.2d (5th. Cir. 1977); judgment vacated, 434 U.S. 962 (1977), following a decision by the Commissioner of Immigration and Naturalization that "the fairest and most efficient manner of dealing with claims for asylum by aliens at U.S. ports of entry" would be to allow the applicants for admission to have evidentiary hearings in their asylum claims before immigration judges. See Statement by INS Commissioner Leonel Castillo before House Judiciary Subcommittee on Immigration, Citizenship, and International Law; February 8, 1978, Press Release, Dep't of Justice, 55 Interpreter Releases 73, 82-83 (Feb. 24, 1978).

The court below justified its decision that the immigration judge's conclusive reliance upon the district director's denial of petitioner's application for an extension of stay did not violate due process by treating her challenge before the immigration judge as a request for a de novo determination of the application and analogizing all applications for extensions by nonimmigrants, although lawfully admitted to the United States, to an application for a visa before a Consular official abroad by an alien who is not in the United States.

Although this Court has held that "an unadmitted and nonresident alien had no constitutional right of entry to this country as a nonimmigrant or otherwise," *Kleindienst* v. *Mandel*, op. cit. at 762; has repeatedly sustained the plenary power of Congress to exclude and deport aliens on whatever grounds, *The Chinese Exclusion Case*, 130 U.S. 581 (1889) and its progeny of cases through *Fiallo* v. *Bell*, 430 U.S. 787 (1977); and has held as to an

alien seeking entry to the United States, that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); the question whether an alien, admitted to the United States, who seeks a statutory benefit under the Immigration and Nationality Act, is circumscribed by these decisions has never been determined by this Court. Cf. *Campos* v. *INS*, 402 F.2d 758 (9th Cir. 1968).

The view that "granting an extension" of a stay in the United States of a nonimmigrant alien is a "political decision committed to executive discretion" is far reaching in its implications as to the nature of the rights of lawfully admitted nonimmigrant aliens in proceedings before the Immigration and Naturalization Service. Cf. *Stokes* v. *INS*, 393 F. Supp. 14 (S.D.N.Y. 1976), requiring a due process hearing prior to the denial of a visa petition on behalf of an alien spouse.

In view of the recent holding of this Court in *Mathews* v. *Diaz*, 426 U.S. 67 (1975), that "even one whose presence in this country is unlawful, involuntary, or transitory," is entitled "to the protection of the due process clause," the question whether an ancillary determination, regardless whether "political", cannot be challenged in a deportation hearing before an immigration judge, prior to the finding of deportability, deserves review by this Court.

An additional factor is that the decision on this issue below seems especially questionable in view of the legislative history of Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a). The suggestion that the ancillary determinations affecting deportability are reviewable in a deportation hearing comports with the legislative purpose "to create a single, separate, statutory form of judicial review of administrative orders for the

deportation . . .of aliens . . . ." *Foti* v. *INS*, 375 U.S. 217, 225 (1963), citing H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22-23 (1961). See also *Kwok* v. *INS*, 392 U.S. 206, 215 (1967). The bifurcated decision-making process which the District of Columbia Circuit upholds here makes the two-step procedure of obtaining judicial review which Congress sought to eliminate a possible three-step walk. The alternative of seeking judicial review in district courts "to determine if the district director's decision was arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law," carries with it the right of appeal of that decision to a circuit court of appeals, while presumably, in the meantime, the deportation proceedings against the alien are stayed. Following the ultimate judicial disposition of the challenge to the district director's decision, the alien would still retain the right to challenge a final order of deportation in a circuit court of appeals pursuant to 8 U.S.C. 1105(a).

In view of the fact that the alternative proposed by the court of appeals invites a proliferation of litigation dealing with the same subject matter, this is a further consideration meriting review of the decision below.

CONCLUSION

For the reasons suggested above, it is urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1909

UNIFICATION CHURCH a/k/a HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, APPELLANT

v.

THE ATTORNEY GENERAL FOR THE UNITED STATES

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 74-1340)

No. 77-1400

KEIKO ASAI, ET AL., PETITIONERS

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petition for Review of an Order of the
Immigration and Naturalization Service

Argued December 12, 1977

Decided March 1, 1978

David Carliner, for appellant/petitioner.

Richard I. Chaifetz, Attorney, Department of Justice, for appellee/respondent.

Before: BAZELON, *Chief Judge*, LEVENTHAL and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: The Unification Church, also known as the Holy Spirit Association for the Unification of World Christianity, is an interfaith religious movement with membership in approximately 40 countries. The Church has established facilities at Tarrytown and Barrytown, New York, to train missionaries needed to staff its worldwide evangelical program. These two cases concern the efforts of the Church to bring aliens to the United States for missionary training at these facilities. In No. 76-1909 the Church appeals the Immigration and Naturalization Service's denial of the Church's petitions to have these aliens admitted as "trainees" under 8 U.S.C. § 1101(a)(15)(H)(iii).[1] *See* 8 U.S.C. § 1184(c). In

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[1] 8 U.S.C. § 1101(a)(15)(H)(iii) reads, in the pertinent part, that:

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> * * * *

No. 77-1400, the Church urges us to vacate deportation orders lodged against these aliens and to stay further deportation hearings until the validity of its H-3 petitions[2] is conclusively determined.

I

A district director of the Immigration and Naturalization Service (INS) initially denied the Church's H-3 petitions. Joint Appendix (J.A.) at 76, 125-30.[3] His

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> (H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (iii) who is coming temporarily to the United States as a trainee . . . .

Before an alien can achieve "H-3" status, an employer must file an acceptable petition with the attorney general. 8 U.S.C. § 1184(c) states:

> The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

These petitions are termed "H-3" petitions.

[2] *See* note 1 *supra*.

[3] The district director concluded that the Church had

> failed to specifically or adequately describe the training program of its organization. The first phase of the proposed training, consisting of approximately 16 months of classroom training, practice teaching and public speaking, is more appropriate to a scholastic program rather than to a training program as contemplated under section 101(a)(15)(H)(iii) of the Immigration and Na-

decision was affirmed by the Northeast regional commissioner. J.A. at 77. The commissioner stated that:

> The record further reveals that many of the beneficiaries—as well as other aliens not currently covered by an approved or pending H-3 petition—were located in various towns and cities throughout the United States engaged in the sale of such merchandise as tea, flowers, candles, peanuts and candy in shopping centers, on the streets, and on a door-to-door basis, and soliciting donations on behalf of the Unification Church. In a number of instances, arrests by police authorities resulted because the solicitation of funds was in violation of local ordinances. Some of these aliens had been in this country less than a few weeks' time, one such individual having been admitted about one week earlier. Many of the aliens encountered by Service officers were found to be in the United States unlawfully by reason of having remained here beyond their authorized period of stay.

J.A. at 80. The commissioner concluded:

> Despite the assertion that such solicitations were only a small part of the overall field experience, information received from various Service officers, throughout the United States substantiates that the

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> tionality Act. Consequently, approval of this petition would, in effect, permit the petitioner to circumvent the regulations governing the admission of nonimmigrant students. The second phase of the proposed training during which the beneficiary would acquire experience in the field consists, in part, of fund raising by solicitation on the street. This aspect of the program is a condition of employment not usually found in bona fide trainee situations. Moreover, the petitioner has not established that trainees engaged in soliciting funds would receive sufficient supervision to prevent possible abuses inherent in such a situation.

J.A. at 76.

> beneficiaries have been widely and repeatedly engaged in such pursuit. We are led to the inescapable conclusion that the petitioner's current training program, which calls for three times as much field work as formal study, has been designed primarily for fund raising rather than for training purposes.

J.A. at 88.

The Church sought review in district court under the Administrative Procedure Act, arguing that these passages revealed that the commissioner had violated INS regulations prohibiting decisionmaking on the basis of adverse information not made available to the affected party.[4] *See* 8 C.F.R. §§ 103.2(b)(2), 214.2(h)(6) (1977). The district court agreed and remanded the case "to the Regional Commissioner" ordering that it be "reopened to provide the plaintiff the opportunity to inspect and rebut the adverse information." J.A. at 32; Civil Action No. 74-1340 (D.D.C. 4 March 1975).

On remand the regional commissioner made available to the Church all adverse information in his files; the Church submitted a memorandum in response to this information. The commissioner reaffirmed his earlier decision, and his ruling was in turn affirmed by the district court. Civil Action No. 74-1340 (D.D.C. 27 July 1976). The Church appeals.[5]

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[4] 8 C.F.R. § 103.2(b)(2) (1977) states that no application presented to the Service can be denied on the basis of derogatory evidence unless the applicant is "advised thereof and offered an opportunity to rebut it and present evidence in his behalf before the decision is rendered." In the adjudication of petitions for alien trainees, 8 C.F.R. § 214.2(h)(6) (1977) provides that: "If an adverse decision is proposed on the basis of any evidence not submitted by the petitioner, he shall be so notified before a final decision is made and invited to inspect and rebut such evidence."

[5] The government argues that this case is moot:

> In this case an application for approval of a trainee program was filed on February 11, 1974. The petition

The Church argues, first, that it was error for the district court not to have remanded the case to the district director. The Church contends that this mistake was harmful because the regional commissioner's determinations are not de novo and because he will set aside the decisions of a district director only if they are arbitrary and capricious.

We find it unnecessary to decide whether the case should have been remanded to the district director. We note that the Church had initially challenged an action of the regional commissioner. When the district court ordered the case remanded to the commissioner, he might have felt obligated by the order to himself proceed in the matter. We need not pursue the problem, however, because it suffices to conclude that we see no prejudice to the Church from the procedure that was followed.

The Administrative Procedure Act requires us to take "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706. While the doctrine under which appellate courts ignore harmless error may not insulate officials or agencies to the same extent that it will trial judges, still it has material application. *Braniff Airways, Inc.*

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represented that the training program would have a duration of 26 months. It was also represented that the approximately 585 alien beneficiaries had already entered this country in a variety of different nonimmigrant classifications and that they had all commenced the training course. Since 26 months from the date of application passed in April or May of 1976, it is reasonable to assume that all of the proposed beneficiaries have completed their training program and should by now have departed the United States.

Brief for appellees at 26-27.

We cannot agree with this argument for the simple reason that there is no evidence in the record whether any beneficiaries of the Church's H-3 petition have in fact begun, much less completed, the proposed training program.

v. CAB, 379 F.2d 453, 465-66 (D.C.Cir. 1967). We cannot hold on this record that appellant has been prejudiced by the remand to the regional commissioner. The commissioner invited appellant to introduce new evidence, J.A. at 154, and appellant neither proffered nor introduced any. Moreover, we do not find that the commissioner's decision was as constricted in scope as represented by appellant. The commissioner stated that:

> The Petitioner has not met the burden imposed upon him by regulation—*Matter of Brantigan*, 11 I. & N. Dec. 493—nor has he shown that the (challenged) decision is without a rational basis or that it is arbitrary, capricious, or an abuse of discretion. Accordingly, the denial of the petitions will be affirmed and the appeals will be dismissed.

J.A. at 182. Even assuming that "the (challenged) decision" referred to is that of the district director rather than the regional commissioner's own prior decision, the commissioner independently concluded that appellant had not met "the burden imposed upon him by regulation." This conclusion is not beyond the commissioner's authority under INS regulations. *See* 8 C.F.R. §§ 103.1(m)(11), 103.3 (1977).*

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* Appellant also contends that the regional commissioner violated 8 C.F.R. 214.2(h)(6) which requires that the "pertinent facts" that are relied upon be "set forth" with the "specific reasons for the decision in the light of the facts. . . ." Although the commissioner concededly permitted the Church access to the entire administrative file, appellant claims that it "was left to speculate which of the mass of undifferentiated statements and reports in the file were 'pertinent facts' for the purpose of rendering an adverse decision." Brief for appellant at 14.

We find, however, that the commissioner has fulfilled his obligations under the regulations when, as in this case, he has made available to the appellant the entire file, and can reasonably claim to have based his decision that the Church's

The Church also argues on appeal that the regional commissioner abused his discretion in denying its H-3 petitions. It contends that the INS has authority only to decide if a proposed training program is bona fide, and that it has "no authority to pass on the administration, development, need, effectiveness, and utility of a bona fide training program."[7] Brief for appellant at 19. We need not reach the question of whether the INS can rely on any of these criteria,[8] however, since in our view the

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missionary program was in actuality a means of fund solicitation rather than a bona fide training program on "the overall import of the evidence considered." J.A. at 178.

[7] *See* note 1 *supra* for the statutory framework governing H-3 petitions.

[8] The INS takes the position that in considering an H-3 petition,

> the Service must determine both whether the training program in question is a bona fide program and whether a necessity exists for that particular training program. This is necessary because Congress intended in enacting 8 U.S.C. 1101(a) (15) (H) (iii) to provide training which would be useful to the economic development of the various foreign nations involved. S. Rep. 1515, 81st Cong., 2d Sess., 567-573 [1950]. If the program in question does not prepare the trainee to perform useful services in his native land, it is highly questionable whether the program is one which Congress envisioned when it enacted this provision.

Brief for appellee at 12-13. INS regulations require an H-3 petition to set out "the reasons why such training cannot be obtained in the alien's country, and why it is necessary for the alien to be trained in the United States." 8 C.F.R. § 214.2(h) (4) (iii). In this case the regional commissioner had concluded that since "the practice of public fund solicitation is frowned upon by people of most other countries," the Church had not demonstrated "that any fund raising techniques or related knowledge acquired in the United States will be utilized by these aliens when they return to their respective native lands." J.A. at 148.

[Continued]

commissioner justifiably determined that the Church's training program was not bona fide. Essentially, the commissioner found that the Church was not training the intended beneficiaries of its H-3 petitions at all, but instead was using them to solicit funds to support the Church. J.A. at 88, 180. We cannot say that this finding constitutes an abuse of discretion.

We also conclude that the denial of its H-3 petitions did not deprive the Church of any First Amendment rights. While we agree with appellant that the attorney general is not vested by statute with the responsibility of imposing standards for the conduct of a religious training program, brief for appellant at 14, we find that the actions of the INS in this case did not amount to such an intrusion. As required by statute, the commissioner merely made the legitimate threshold determination that the Church's training program was not bona fide. *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972).

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[8] [Continued]

Suffice it to say that Senate Report No. 1515 does not appear to stand for the proposition for which it is cited by the INS. In fact the Report states that "[t]he promotion of trainee programs has been adopted as part of the United States foreign policy as a means of spreading a better understanding of our country among the peoples of the world, and assisting in the rehabilitation of war-devastated countries." *Id.* at 571-72. In any event the Report is not a particularly reliable source of insight into congressional intent, since it was composed in response to a Senate resolution to investigate the immigration system and did not accompany any actual legislation. Moreover, the Report actually recommended that a special classification for trainee nonimmigrants *not* be created, *id.* at 573, a recommendation set aside two years later by the 82d Congress when it enacted § 101(a) (15) (H) (iii) of the Immigration and Nationality Act of 1952, 66 Stat. 168.

II

The approximately 585 beneficiaries of the Church's H-3 petitions were variously admitted to the United States as visitors for business or as visitors for pleasure. *See* 8 U.S.C. § 1101(a)(15)(B). The parties have stipulated that this court treat Keiko Asai as representative of these beneficiaries.[9]

When the Northeast regional commissioner denied the Church's H-3 petitions, Asai applied for an extension of her stay in the United States. On September 5, 1974, the district director denied her application, stating as his reason that she "failed to establish that the purpose for which [she was] admitted has not been accomplished and that [her] requested extension is not merely an attempt to prolong [her] stay indefinitely." Appendix (App.) at 17. Asai was instructed "to depart from the United States not later than September 20, 1974." *Id.* No hearing was held before the district director.

When Asai failed to depart the United States by September 20, an Order was served upon her to show cause why she should not be deported. At her deportation hearing, the Immigration Judge ruled that her deportability had "been established by clear, convincing, and unequivocal evidence." *Id.* at 13. Relying on *Matter of Sourbis*, 11 I & N Dec. 335 (1965), he ruled that it was not necessary for him to determine whether the purpose for which she was admitted to the United States had been accomplished or whether she was merely attempting to

[9] The parties have agreed that "the administrative record relating to *Matter of Asai* contains all of the relevant materials required for this court to determine the issues; (and) that the administrative records relating to the remaining named petitioners are not required for the presentation of the factual and legal questions to this court in considering the present appeal." Brief for petitioner at 2 n.4.

prolong her stay indefinitely, because he did "not have jurisdiction to make any determination as to the propriety of the District Director's decision." App. at 9. The Judge also ruled that the INS was under no obligation to stay deportation proceedings pending a final judicial resolution of the Church's H-3 petitions. On appeal, the Judge's decision was sustained by the Board of Immigration Appeals.[10] In No. 77-1400, Asai petitions this court for review.[11]

[10] Asai failed to depart voluntarily, and a warrant of deportation was issued on April 18, 1977.

[11] The INS argues that this petition should be dismissed for lack of venue. We do not agree.

Section 106(a)(2) of the Immigration and Nationality Act, as amended, Sept. 26, 1961, Pub.L. 87-301, 75 Stat. 651, 8 U.S.C. § 1105(a)(2), provides:

> the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit.

Section 101(a)(33) of the Act, 8 U.S.C. § 1101(a)(33), defines residence as follows:

> The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

This definition represents a codification of the Supreme Court's holding in *Savorgnan v. United States*, 338 U.S. 491 (1950), *see* H.R.REP. NO. 1365, 82d Cong., 2d Sess. 33 (1952), in which the Court noted that, as distinguished from domicile or permanent residence, intent is not material to establish actual residence, principal dwelling place, or place of abode.

In this case, the petitioners' affidavits indicate that their "official residence" for the purpose of all communications in the United States was originally established in Washington, D.C. Although having thereafter lived "temporarily" in

Asai argues, first, that this court should invalidate the deportation order issued against her and stay all further deportation hearings pending a final judicial determination of the Church's H-3 petitions. Asai claims that the deportation proceedings render her ineligible under 8

New York, petitioners state that they have now resumed their residency in Washington. No effort is made to conceal the motive behind their return to the District, it being to secure venue before this court for the appeal of their deportations.

Respondent alleges that despite these statements, the petitioners do not, in fact, reside in Washington, D.C. Respondent's affidavits on this issue, however, are less than dispositive. In fact, all they conclusively indicate is that petitioners have only spent a brief time physically present in Washington. Currently, they note, petitioners are outside Washington, engaging in "missionary" work in various parts of the country. From this respondent concludes that petitioners have not been present in Washington long enough to establish residency and, therefore, must be considered residents of New York.

The fact that petitioners have spent only a short time physically present in the District, however, does not foreclose their having established residency here. Residency does not require continuous physical presence; in fact,

> "Principal" admits of multiple stopping-places, just as "general abode" admits of other specific habitation not so qualified. . . . Thus, it is a question of fact in each instance as to *which* is the "principal dwelling place."

Toy Teung Kwong v. Acheson, 97 F.Supp. 745, 747 (N.D. Calif. 1951). Consequently, there being no direct evidence contrary to petitioners' claims that they have abandoned their New York residency, the remaining facts, on balance, favor a finding that petitioners have now established residency in Washington. Since, as the INS acknowledges, a major purpose of section 1105a(a)(2) was to speed up the review of deportation orders, and since the parties in this case have agreed that all other similarly situated potential litigants will be bound by the decision of this court on the merits, *see* note 9 *supra*, thus resulting in the expeditious disposition of approximately 175 pending matters before the INS, we hold that venue exists.

U.S.C. § 1258 to change her nonimmigrant status to that of a trainee should a court ultimately decide that the Church's H-3 petitions be granted.[12] She requests relief under the Administrative Procedure Act, 5 U.S.C. § 705, which she urges authorizes this court to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."[13]

Putting aside the fact that we have today upheld the INS's denial of the Church's H-3 petitions, we find petitioner's argument to be without merit. Section 1258 of Title 8 of the United States Code states:

> The Attorney General may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is *continuing to maintain that status*, ...

(Emphasis added.)

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[12] Following the order of the district court that the Church's H-3 petitions be reconsidered by the regional commissioner, the INS deferred action to enforce the departure of the petitions' beneficiaries until entry of the district court's final decision. The question, therefore, is whether the deportation proceedings should be stayed pending this court's decision and any further judicial appeals.

[13] Petitioner argues that the APA *requires* the INS itself to preserve her status and rights pending the conclusion of judicial review. Brief for petitioner at 27. We need only point out, however, that § 705 states only that, even if justice requires such a stay, an agency "*may* postpone the effective date of action taken by it, pending judicial review." (Emphasis added.)

Although there is considerable discussion in petitioner's brief about various representations made by INS officials, petitioner does not rely on an estoppel theory, as indeed she cannot, having not demonstrated any detrimental reliance on these representations.

It is not clear from the statute whether an applicant nonimmigrant must continue to maintain his "status" only until he petitions for a change in classification,[14] or whether he must continue to maintain it until his petition is granted. In either case, however, the vacating of the deportation order would not assist Asai in the assertion of her rights under the statute. There is no question that Asai was maintaining her status within the meaning of INS regulations when she initially filed to change to an H-3 nonimmigrant classification.[15] Her later deportation cannot change that fact.[16] On the other hand, if the statute is interpreted as requiring the applicant alien to continue to maintain his status until a change in classification is granted, the deportation proceedings are equally irrelevant. Asai ceased to maintain her status on September 20, 1974, when she failed to depart the United States as instructed by the district director. App. at 19. We conclude, therefore, that vacating the deportation orders issued against the beneficiaries of the Church's H-3 petitions will not serve to protect their rights under 8 U.S.C. § 1258 pending final judicial review of their case.

Asai's second argument in this petition is that her deportation hearing lacked due process of law because the Immigration Judge refused to consider de novo the district director's denial of her application for an extension of her stay. The director had determined that Asai had "failed to establish that the purpose for which [she was] admitted has not been accomplished and that [her] requested extension is not merely an attempt to prolong [her] stay." Asai's position is that the director's conclusion rests upon findings of fact, yet she was provided neither with notice of these proposed findings nor with a hearing in which to refute them.

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[14] This appears to be the position taken by the INS in its regulations. *See* 8 C.F.R. § 248.1(a), (b) (1977), note 15 *infra*.

[15] The pertinent INS regulations are to be found at 8 C.F.R. § 248.1(a), (b) (1977):

> § 248.1 Eligibility.
>
> (a) *General.* . . . [A]ny alien lawfully admitted to the United States as a nonimmigrant, . . . who is continuing to maintain his nonimmigrant status, may apply to have his nonimmigrant classification changed to any nonimmigrant classification other than that of a fiancee or fiance under section 101(a)(15)(K) of the Act.
>
> (b) *Maintenance of status.* In determining whether an applicant has continued to maintain his nonimmigrant status, the district director shall consider whether the alien has remained in the United States for a longer period than that authorized by the Service, and shall consider any conduct by the applicant relating to his maintenance of the status from which the applicant is seeking a change. An applicant may not be considered as having maintained his nonimmigrant status within the meaning of this section if he failed to submit his application for change of nonimmigrant classification before his authorized temporary stay in the United States had expired, unless the district director in his discretion is satisfied that the failure to file a timely application was excusable, that the alien has not otherwise violated his nonimmigrant status and is a bona fide nonimmigrant, and the alien is not the subject of deportation proceedings under Part 242 of this chapter.

[16] Thus the Board of Immigration Appeals stated specifically that "[t]he remedies being sought by the respondents are not relevant to the question of their deportability. Their presence in the United States is not required for the pursuit of the petitions for H-3 classification." App. at 5.

Given this observation of the Board of Immigration Appeals, we feel confident in interpreting the reference in § 248.1(b) to deportation proceedings as indicating merely an additional factor that a district director may consider if an alien has failed to submit an application for a change in nonimmigrant classification "before his authorized temporary stay in the United States had expired." Asai, of course, applied *before* her temporary stay had expired.

The INS contends that we have no jurisdiction under 8 U.S.C. § 1105a(a) to review decisions of a district director that are collateral to a deportation proceeding.[17] Such decisions, the INS urges, are reviewable in district court. *See Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 (1968); *Butterfield v. INS*, 409 F.2d 170 (D.C. Cir. 1969).

Petitioner responds that she is not asking this court to review the decisions of the district director, but to pass on the validity of INS's interpretation of its own regulations making these decisions, reached without the opportunity for a hearing, binding on an Immigration Judge during a deportation proceeding. *See Matter of Sourbis*, 11 I & N Dec. 335 (1965); 8 C.F.R. §§ 103.1(f), 214.1(a), 242.16 (1977).

We agree that we have jurisdiction to consider this question, embracing as it does a final determination "made during a proceeding conducted under § 242(b) [8 U.S.C. § 1252(b)]." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 216 (1968). Nevertheless, we find that petitioner's deportation hearing did not lack due process.

There is no specific statute that grants the attorney general the authority to extend the stay of a nonimmigrant in the United States. Section 1184(a) of Title 8 of the United States Code, however, authorizes the attorney general to admit nonimmigrants "for such time" as he "may by regulations prescribe." The attorney gen-

[17] 8 U.S.C. § 1105a(a) provides that the procedures prescribed by the Administrative Orders Review Act, 28 U.S.C. § 2341, *et seq.*

> shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act [8 U.S.C. § 1252(b)] . . . .

eral has authorized district directors to decide whether extensions should be granted; these decisions are made without a hearing and without appeal. *See* 8 C.F.R. § 241.1(a) (1977). The granting of an extension is thus a political decision committed to executive discretion, and is conceptually analogous to the original granting of a visa. *See* 8 U.S.C. § 1201(a) (1970). Due process of law requires no hearing if an application for a visa is denied. *See United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C.Cir.), *cert. denied sub nom. United States ex rel. Ulrich v. Stimson*, 279 U.S. 868 (1929). While we are aware that petitioner was a lawfully admitted alien at the time of her application for an extension of the period of her temporary stay, we hold that the requirements of due process were met in these circumstances by the availability of judicial review under the Administrative Procedure Act to determine if the district director's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *Cf. Foti v. INS*, 375 U.S. 217, 228 & n.15 (1963).

Since the district director's denial of petitioner's application did not violate due process, neither did the Immigration Judge's reliance on it at her deportation proceeding. The attorney general is authorized by statute to delegate the duties and powers conferred upon him by the Immigration and Nationality Act, 8 U.S.C. § 1103, and we will not disturb the regulations he has established delegating these powers unless they violate the Act or the Constitution.[18]

[18] The cases petitioner presses upon us are unavailing to establish her position. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), concerned a statutory interpretation of conflicting sections of the Federal Communications Act, *id.* at 329-30, whereas we do not find any contradiction between 8 U.S.C. § 1184(a), authorizing the Attorney General to admit nonim-

We therefore affirm the decision of the Board of Immigration Appeals in No. 77-1400, and we affirm the decision of the district court in No. 76-1909.

So ordered.

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migrants for such time as he may by regulations prescribe, and 8 U.S.C. § 1252(b), requiring that special inquiry officers conduct proceedings to determine the deportability of aliens. Similarly Mahler v. Eby, 264 U.S. 32 (1924), rested squarely on questions of statutory interpretation; the case determined what factual findings were necessary to support an order of deportation under the Act of May 10, 1920, c. 174, 41 Stat. 593.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNIFICATION CHURCH, Plaintiff, v. THE ATTORNEY GENERAL FOR THE UNITED STATES, Defendant.	)	Civil Action No. 74-1340

MEMORANDUM OPINION

This matter is back before the Court on cross-motions for summary judgment. This Court by Memorandum Opinion and Order dated March 4, 1975 determined that defendant had not followed his own procedures with respect to the admission of derogatory information concerning the plaintiff into the administrative record. The Court found that defendant had failed to advise plaintiff that derogatory information would be used and had failed to offer plaintiff an opportunity to rebut such information and to present evidence in its own behalf as required by 8 C.F.R. 103.2(b) (2) and 214.2(b) (6).

The Court ordered the case remanded to the Regional Director of the Immigration and Naturalization Service "for the specific purpose of allowing the plaintiff to comment on and rebut such evidence as was considered by

the Regional Commissioner" in his decision affirming the denial of the Church's petition to classify various non-immigrant aliens as trainees pursuant to 8 U.S.C. § 1101(a) (15) (h)(iii) (1970).

The motions for summary judgment were held in abeyance pending the receipt of the new decisions by the Regional Commissioner. The decision by the Regional Commissioner was rendered on Feburary 15, 1976. The Church seeks a declaratory judgment that the denial by the Immigration and Naturalization Service of the Church's petition was arbitrary, capricious and otherwise not in accordance with the law.

The facts as recited in this Court's prior Memorandum Opinion are repeated herein in the interest of clarity.

The Unification Church is a religious organization chartered under the laws of the State of New York and with its headquarters in Washington, D.C. The Church maintains missionary training facilities in Tarrytown and Barrytown, New York. Since 1972, aliens have entered this country and engaged in the activities of the Church. Most have been admitted under the immigration laws as temporary visitors for business or pleasure. But a small number of Japanese were admitted pursuant to a petition approved on June 7, 1972 as non-immigrant missionary trainees. The exact number of aliens who have entered the country and who remain at the present time is subject to some dispute. The Church alleges that it has complete records of all such aliens at its Central Missionary Visa Office in Washington, D.C.

Beginning in January 1974, plaintiff's representatives filed four visa petitions in an effort to obtain clarification of the immigration status of plaintiff's trainees. The first petition number NYC-N-42465, was filed on behalf of Herman ten Bokkel Huinink. The other three petitions, number NYC-N-43048 on behalf of 574 aliens, number NYC-N-43367 on behalf of three aliens, and number NYC-N 43579 on behalf of five aliens, were filed shortly thereafter. During the time the petitions were under administrative consideration, no extensions of the temporary stay visas were granted. The parties dispute the reasons for the failure to extend these visas.

On April 4, 1974, the District Director of the Immigration and Naturalization Service denied the initial petition and certified it for review to the Regional Commissioner in Burlington, Vermont. Oral argument was heard on May 9, 1974. Thereafter, on May 20, 1974, the Regional Commissioner affirmed the District Director's decision. On May 23, and June 6, 1974, the District Director denied three additional petitions. Their denial was also certified to the Regional Commissioner. Argument was held in New York City on July 11, 1974, and on August 31, 1974, the Regional Commissioner affirmed the District Director's denial of the three petitions. Plaintiff filed suit on September 10, 1974. Following remand to the Immigration and Naturalization Service and consideration of plaintiff's "Memorandum in Reply to Adverse Information," the Regional Director's decision was rendered on January 15, 1976. The decision concluded that the prior decision had been proper and that the rebuttal material submitted by the petitioner did not establish an adequate basis for overturning the

decisions of the Commissioner.

The Attorney General is charged with the administration of the laws relating to the immigration and naturalization of aliens and is specifically empowered in section 214(c) of the Immigration and Nationality Act, 8 U.S.C. § 1184 (c), to determine whether petitions to classify aliens as trainees should be granted.

Section 214 of the Act, as amended, provides:

> (c) The question of importing any alien as a non-immigrant under section 101(a) (15) (H) or (L) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

Section 101(a) (15) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1101 (a) (15), provides:

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens -
>
> (H) an alien having a residence in a forign country which he has no intention of abandoning. . .

> (iii) who is coming temporarily to the United States as a trainee . . .

Plaintiff initially maintains that the Service has failed to comply with the opinion and order of this Court dated March 4, 1975. Plaintiff contends that the Regional Commissioner erred by reopening the appeals decided by the District Director, permitting plaintiff to examine material contained in the administrative record and to reply to adverse information contained therein, reconsidering his own decisions dismissing the appeals and ordering once again that the appeals be dismissed. Plaintiff contends that the proper procedure on remand would have been for the Regional Commissioner to reopen the case and remand the petitions to the District Director for reconsideration and for compliance with Service regulations, and if an adverse ruling were rendered by the District Director, an appeal to the Regional Commissioner for review would lie. In the absence of regulations specifically providing for such a procedure on remand, the Regional Commissioner acted within his prerogative in not referring the petitions to the District Director for initial decision. Since the only function involved was the weighing of rebuttal presentations of the plaintiff, there was no function which could better have been served by a referral to the District Director.

Secondly, plaintiff contends that the procedures followed by the District Director in denying plaintiff's petitions were deficient in that the Director did not specify which items of derogatory information he relied upon. The Regional Commissioner, however, afforded plaintiff access to the entire administrative

file in order to allow plaintiff to prepare a meaningful rebuttal. The Regional Commissioner also set out with some measure of specificity the information relied upon by the Service in denying plaintiff's petition. The procedures utilized by the Service were legally sufficient and afforded plaintiff petitioner full apprisal of the information and materials relied upon by the Service. Likewise, plaintiff's other arguments regarding procedural irregularities are without merit.

Plaintiff also maintains that the Attorney General has exceeded his statutory authority by imposing requirements on the petitioner which are not mandated by the immigration laws. The Court determines that the Attorney General was not acting beyond the scope of his statutory authority when he considered,among other relevant factors, the administration, effectiveness and utility of plaintiff's training program.

Having determined that the Immigration and Naturalization Service and the Attorney General acted within the scope of their authority and followed the requisite procedural requirements, the Court must consider whether the Attorney General's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2) (a). See, Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974); Camp v. Pitts, 411 U.S. 138 (1973). After a careful review of the administrative record, the Court determines that the decision of the Attorney General and/or his agents was based on a consideration of the relevant factors and did not involve a clear error of judgment on his part. The decision contained a rational basis and was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The Regional Commissioner, in determining that plaintiff had not submitted a bona fide training program, indicated that the training program was neither well established nor realistic and was not appropriate to accomplish the purpose for which it was established. The Commissioner also determined that the training program was devoted largely to fund raising efforts on behalf of plaintiff in contravention of the purpose envisioned by 8 U.S.C. § 1101 (a) (15) (H) (iii). Defendant's determinations based on these and other considerations specified in the Regional Commissioner's decision do not constitute an arbitrary or capricious decision, nor an abuse of the discretion vested in the Attorney General. The Court may not subsitute its own judgment for that of the authority possessing the authority and the expertise to make such determinations. Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973).

Finally, plaintiff maintains that defendant's attempt to supervise and control plaintiff's missionary training activities conflicts with the free exercise clause of the First Amendment. No argument has been advanced that the Service has interfered with or restricted the rights of United States citizens to pursue the personal religious beliefs. Incidental restrictions, if any, on alien individual's rights to the free exercise of their chosen religion resulting from defendant's enforcement of the immigration laws were insubstantial and outweighed by the necessity for enforcement of said law.

/s/ _____

UNITED STATES DISTRICT JUDGE

Dated: July 26, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNIFICATION CHURCH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 74-1340
THE ATTORNEY GENERAL FOR THE UNITED STATES,	)	
	)	
Defendant.	)	

O R D E R

This matter having come before the Court on cross motions for summary judgment, the Court having considered the motions and the other papers filed herein, including the complete administrative record, and the Court having determined that there exist no genuine issues of material fact and that the defendant is entitled to judgment as a matter of law, and in accordance with the Memorandum Opinion filed herein, it is by the Court, this 26th day of July, 1976,

ORDERED that plaintiff's motion for summary judgment should be, and hereby is, denied, and it is further

ORDERED that defendant's motion for summary judgment should be, and hereby is, granted and this matter is dismissed.

UNITED STATES DISTRICT JUDGE

FILED, March 4, 1975,
James F. Davey, Clerk

Civil Action No. 74-1340

MEMORANDUM OPINION

This matter is before the Court on cross motions for summary judgment. Plaintiff, the Unification Church, filed suit on September 10, 1974. The Church seeks a declaratory judgment that the denial by the Immigration and Naturalization Service of the Church's petition to classify various nonimmigrant aliens as trainees pursuant to 8 U.S.C. § 1101(a) (15)(II)(iii)(1970) is arbitrary, capricious or otherwise not in accordance with law.

The Unification Church is a religious organization chartered under the laws of the State of New York and with its headquarters in Washington, D.C. The Church maintains missionary training facilities in Tarrytown and Barrytown, New York. Since 1972, aliens have entered this country and engaged in the activities of the Church. Most have been admitted under the immigration laws as temporary visitors for business or pleasure. But a small number of Japanese were admitted pursuant to a petition approved on June 7, 1972 as non-immigrant missionary trainees. The exact number of aliens who have entered the country and who remain at the present time is subject to some dispute. The Church alleges that it has complete records of all such aliens at its Central Missionary Visa Office in Washington, D.C.

Beginning in January 1974, plaintiff's representatives filed four visa petitions in an effort to obtain clarification of the immigration status of plaintiff's trainees. The first petition, number NYC-N-42465, was filed on behalf of Herman ten Bokkel Huinink. The other three petitions, number NYC-N-43048 on behalf of 574 aliens, were filed shortly thereafter. During the time the petitions were under administrative consideration, no extensions of the temporary stay visas were granted. The parties dispute the reasons for the failure to extend these visas.

On April 4, 1974, the District Director of the Immigration and Naturalization Service denied the initial petition and certified it for review to the Regional Commissioner in Burlington, Vermont. Oral argument was heard on May 9, 1974. Thereafter, on May 20, 1974, the Regional Commissioner affirmed the District Director's decision. On May 23, and June 6, 1974, the District Director denied the three additional petitions. Their denial was also certified to the Regional Commissioner. Argument was held in New York City on July 11, 1974, and on August 21, 1974, the Regional Commissioner affirmed the District Director's denial of the three petitions.

Plaintiff asserts numerous grounds which, in its view, mandate the declaratory relief it seeks. Only one ground need be considered at this juncture. The Church alleges that the Immigration and Naturalization Service violated its own regulations in failing to give it the opportunity to rebut

adverse evidence relied upon by the Regional Commissioner in his decision of May 20, 1974 affirming the denial of the petition relating to Mr. Huinink.

8 C.F.R. §103(b)(2)(1974) states that no application presented to the Service can be denied on the basis of derogatory evidence unless the applicant is "advised thereof and offered an opportunity to rebut it and present evidence in his own behalf before the decision is rendered." In the adjudication of petitions for alien trainees, 8 C.F.R. §214.2(b)(6)(1974) provides that: "If an adverse decision is proposed on the basis of any evidence not submitted by the petitioner, he shall be so notified before a final decision is made and invited to inspect and rebut such evidence."

The Regional Commissioner's decision on petition number NYC-N-42465 states:

> "The record further reveals that many of the beneficiaries -- as well as other aliens not currently covered by an approved or pending petition -- were located in various towns and cities throughout the United States engaged in the sale of such merchandise as tea, flowers, candles, peanuts and candy in shopping centers, on the streets, and on a door-to-door basis, and soliciting donations on behalf of the Unification Church. In a number of instances, arrests by police authorities resulted because the solicitation of funds was in violation of local ordinances. Some of these aliens had been in this country less than a few weeks' time, one such individual having been admitted about one week earlier. Many of the

aliens encountered by Service officers were found to be in the United States unlawfully by reason of having remained here beyond their authorized period of stay." Regional Commissioner's Decision of May 20, 1974 at 4.

Further, the opinion states:

"Despite the assertion that such solicitations were only a small part of the overall field experience, information received from various Service Officers throughout the United States substantiates that the beneficiaries have been widely and repeatedly engaged in such pursuit. We are led to the inescapable conclusion that the petitioner's current training program, which calls for three times as much field work as formal study, has been designed primarily for fund raising rather than for training purposes." Regional Commissioner's Decision of May 10, 1974 at 12.

In its opposition filed on February 5, 1975, the defendant admits, that the District Director relied upon certain evidence in reaching his decision on the first petition, but that plaintiff was aware of this evidence by time of appeal to the Regional Commissioner and that it did not formally request to see the evidence and did not try to rebut it. Further, the defendant argues that the plaintiff did not object to its use and that it waived its rights to raise that issue at a later time. Like argument is made in regard to the denial of the other petitions.

The decision of the District Director, Sol Marks, on the initial petition, does not reflect the use of the adverse evidence as claimed by the defendant, but it is clear that the Regional Director did rely in part upon such evidence in addition to the reasons of the District Director. In this regard, the transcript of the hearing held on May 9, 1974 states:

MR. CARLINER: Yes, but what I'm attempting to say is that you can approve the petition based upon the evidence that has been produced. If you disapprove the petition, I won't say specifically it is inappropriate to disapprove upon grounds which haven't been relied upon by the District Director. But I don't think that's good administrative practice because we are reviewing the District Director's decision and, if you're going to use new grounds, we should have an opportunity to meet them. All we've been able to do here is that we were put on notice by Mr. Mark's decision that he had specific reasons for turning down the petition. . ." Transcript of May 9, 1974 at 55-56.

At the second oral argument held on July 11, 1974, plaintiff's counsel again voiced objection to the use of adverse information without the opportunity to rebut. Transcript of July 11, 1974 at 2-3.

Clearly there was no waiver by the plaintiff of the rights afforded it under the regulations. Its objection was preserved. The regulations represent an accommodation between the need for a decision based upon all the evidence from whatever source and the right in an

adjudicatory proceeding to confront and cross-examine that evidence. See K. Davis, Administrative Law Treatise, §15.08 (1958). They place an affirmative duty upon the Immigration and Naturalization Service to proffer the information to the petitioner for his inspection. Such was not done in this case.

The case must be remanded to the Regional Commissioner and reopened to provide the plaintiff the opportunity to inspect and rebut the adverse information. The Immigration and Naturalization Service must then reconsider its denial on all four petitions. When this process is completed and if the denials are affirmed, the case will then be in a posture for review on the merits by the Court.

/s/

JUNE L. GREEN
U.S. District Judge

Dated: March 4, 1975

FILED March 4, 1975 -
John F. Davey, Clerk

Civil Action No. 74-1340

ORDER

In accordance with the Memorandum Opinion filed on this date, it is by the Court, this 4th day of March, 1975.

ORDERED that the case is remanded to the Regional Director of the Immigration and Naturalization Service for the specific purpose of allowing the plaintiff to comment on and rebut such evidence as was considered by the defendant; and it is

FURTHER ORDERED that the motions for summary judgment are held in abeyance pending the receipt of the new decisions by the Regional Commissioner.

/s/
JUNE L. GREEN
IU.S. District Judge

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Northeast Regional Office
Burlington, Vermont

FILES: NYC-N-42465 (New York)
NYC-N-43048 (New York)
NYC-N-43367 (New York)
NYC-N-43579 (New York)

In re: Petitions of Holy Spirit Association for the Unification of World Christianity a/k/a Unification Church in behalf of one (1) alien, five hundred seventy-four (574) aliens, three (3) aliens and five (5) aliens respectively.

PETITIONS TO CLASSIFY ALIENS OF NONIMMIGRANTS PURSUANT TO THE PROVISIONS OF SECTIONS 214(c) AND 101(a)(15)(h) OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

IN BEHALF OF PETITIONER: David Carliner, Esq.
1709 New York Avenue,N.W.
Washington, D.C. 20006

These cases are before us on remand from the United States District Court for the District of Columbia. Pursuant to the directive of the Court, the Service has reopened on its own motion the above four cases and provided the Petitioner an opportunity to inspect and rebut all adverse information which was considered by the Regional Commissioner in rendering his earlier denials of said petitions.

On October 22, 1975, counsel for Petitioner submitted his comments on the adverse evidence in the form of a memorandum in reply to adverse information. In his memorandum counsel objects to the freedom afforded him in replying to the adverse information and requests that we direct him in the exact manner that his rebuttal should be formulated and submitted. We have left to counsel's discretion the broad latitude of his presentation for rebuttal as provided by regulation 8 CFR 103.2(b)(1). The above reference prescribes that any additional information or evidence may be submitted in like form as the original supporting documentation of the petition or application. Counsel also comments on the voluminous amount of materials furnished for his review and notes on the lack of the Regional Commissioner's specificity with the adverse information furnished. Counsel implies that the Regional Commissioner is remiss in not providing the Petitioner the specifics within the adverse information on which his decision was based. We respectfully disagree with counsel's objection on this point and contend the Petitioner has been provided an opportunity to review all evidence impugning the petitions' approval that was considered by the Regional Commissioner.

We urge that the Regional Commissioner's decision relative to the above petitions was based on the overall import of the evidence considered. It was an overview of all factors and not a matter of limiting our considerations to a few specifics. The conclusions rendered were based upon our interpretation of the entire record. Counsel seeks to encumber the Service with an undue burden not contemplated within 5 CFR 103.2 by urging that the Regional

Commissioner circumscribe the basis for his denial of the petitions to a few specific items.

Counsel urges the exclusion of various factors considered by the Regional Commissioner in these proceedings. We submit that since the visa petition adjudication and review is an administrative proceeding, civil in nature, the rules of evidence followed criminal cases in the courts are not controlling. Our criteria in appraising evidence in this administrative proceeding is whether it has probative value - and relative to the issues - and whether its use is consistent with a fair proceeding.

It is asserted in the transcript of the oral argument heard on May 9, 1974, that the Petitioner keeps a close record on everyone in the United States who is involved with the Unification Church. A reasonable conclusion follows that the Petitioner was certainly aware of the past actions of the benficiaries while participating in church fund-raising activities. We submit that the Petitioner could not reasonably believe that the Service would ignore these fund-raising activities or arrests in connection with them in considering the instant petitions.

The records of apprehension furnished the Petitioner in our adverse information are identifiable to various individual aliens in the United States under the direct auspices of the petitioning church. These aliens when processed by Service or local civil authorities were participating in a fund-raising program administered by the Petitioner that is not unlike his proposed training activities now under consideration.

The Regional Commissioner's reference to these arrests' records was not made in relationship to the individual beneficiary's eligibility but to demonstrate their conduct in general while under the Petitioner's supervision.

For example, one of these arrest's records relate to an individual who was arrested in Ocean Springs, Miss. on June 16, 1974. The report indicates that numerous complaints had been received on the subject and his colleagues for going door to door in residential neighborhoods and soliciting monies from the citizenry. The report also shows that the subject was warned by local authorities on June 15, 1974, to not solicit monies without a permit.

We contend that the evidence of record in this case reasonably supports the Regional Commissioner's conclusion i.e., that the field activities of the Petitioner, which comprise two thirds of the training time, are to solicit monies rather than provide substantial training.

Counsel has stated that the Service has failed to sustain its conclusions that the field experience portion of the Petitioner's program appears to be primarily a fund-raising program. He charges that the Regional Commissioner's decision was made in utter disregard of the substantial evidence submitted by the Petitioner. We contend that his opinion that the supporting documentation of the petition fairly establishes that the fund raising is merely an incidental part of the overall religious training program of missionary activity is purely conjecture on counsel's part - reached by giving a desired and favorable interpretation of the evidence and the impeachment of any factors not congenial to his views.

He articulately brushes the picture of the beneficiaries only receiving donations from benefactors who feel a strong commitment toward the Petitioner's aspirations and goals, an opinion not corroborated by evidence of record. Counsel has euphemized the sale of selected articles, i.e., the exchange of an article for money. Counsel has stated in oral testimony that in a hard light the exchange may be viewed in the light of a sale. The Petitioner confirmed that the article given by the solicitor does have a minimum fixed price, and the exchange in the final analysis is conditioned upon the receipt of money.

Page 7 of Record of oral argument of May 9, 1974, reads as follows:

Mr. Carliner: "There is no question that the Unification Church does raise funds by, what they prefer to call, the soliciting of donations on the street and I can't deny there may have been abusiveness and maybe the technique varies from person to person - but the exchange of peanuts, of candy, of flowers, of geraniums and of candies, is not intended to be a sale of merchandise as one would . . . although if you look at it very coldly, it is a sale - the person does not get the candy, I suppose, unless he makes a contribution and it may very well be . . . I've seen material which indicates such . . ."

We believe that a stiffer brush approach would convey a more realistic interpretation on the money-soliciting activities of the Petitioner.

Under Section 101(a)(15)(h)(iii) of the Immigration and Nationality Act, it is contemplated that the training received be substantial,

the beneficiary must have the background and education to adequately assimilate the designated training. Such training cannot be a continuation in the form of practical experience in an already acquired expertise. It has been held that the training of an individual must provide him more than further day-by-day, on-the-job experience and application of his skills for the sake of higher degree of proficiency, Matter of Treasure Craft of California, Int. Dec. No. 2163 (1972).

We have held that the ratio of the Petitioners training program of approximately 20 months'field experience versus 10 months' classroom training is unrealistic. Counsel has stated that this is a gratuitous conclusion not supported by evidence of record. He contends that it is arbitrary and capricious to deny the present petitions on the ground that the training program is disproportionate to the "scholastic program." In the Matter of Treasure Craft of California, supra, additional guidelines are set forth on what constitutes a bona fide training program for H-3 trainees. The decision states in part:

> "A training program designed principally for the purpose of providing the beneficiaries substantial and meaningful training can reasonably be expected to offer more than learing 'the separate duties when, as, and where its opportunity affords.' Training in this manner will provide the beneficiaries little, if any, training which is not incidental to the employment of any worker in a position which involves purely productive labor." Emphasis added.

We contend that the evidence of record submitted by the Petitioner fails any reasonable test to substantiate a viable training program within the interpretation of law for the 20 months of practical experience for 583 beneficiaries. A good portion of the trainees' activities must be viewed as productive employment. This presumption is not contingent on the beneficiary receiving a salary, only that he is performing the day-by-day duties that are necessary in the operation of the Petitioner's endeavors. The record establishes these functionary duties are being performed by the 583 beneficiaries under consideration. We submit that the evidence does not require a highly skilled interpretation to reach this conclusion.

We submit that counsel is in error in his assumption that an alien's past participation in the Petitioner's training program is not now germane. Relativity arises to the matter in question because the same aliens are the beneficiaries of the said petitions. As stated by counsel, such possible violation of the alien's nonimmigrant status could correctly be applied should he be an applicant for a change in nonimmigrant status under Section 248 of the Act. However, his background and any training which he may have already received is relative to the question at hand in determining if the prospective program for which he is being petitioned is realistic; that if it is substantial in the light of his past experience and training or is it merely a repetition of acquired knowledge. Additionally, the beneficiaries ability to assimilate specified criteria outlined in any training program must be

considered. Judgment on the trainees capability must be drawn from his past. The prior experience and training of an alien are factors to be considered in adjudicating an H-3 training petition. Matter of Miyazaki Travel Agency, Inc., 10 I. & N. Dec. 644. Here it was held that a beneficiary who had been employed as a travel agent for the last three years was ineligible for a 50-week training program in the same capacity.

On his belief that it was not required, the Petitioner has declined to furnish much of the information requested on the beneficiaries prior training and activities while in the United States under his supervision. We will not further argue his prerogative on this issue but do submit only that if, as in this case, there exists sufficient doubt to warrant denial, the Service is not required to conduct an outside investigation to resolve the issue. Matter of Holmes, Int. Dec. No. 2274 (BIA 1974). The burden of establishing eligibility in visa petition proceedings never shifts from the Petitioner to the Government, notwithstanding counsel's argument to the contrary.

The Petitioner is seeking trainee status for 583 aliens by four petitions and in doing so must show that the training specified in each petition is relative to each and every beneficiary. The proposed training on one petition may not be administered on an individual basis at the discretion or selection of the Petitioner based on his interpretation of the individual's needs. If the Petitioner desires an individual training program then each beneficiary must be supported by a separate petition designating a training program geared to such individual's needs.

Counsel holds that the source of the beneficiaries' income is precluded from consideration by 8 CFR 214(h)(4)(ii) and contends that it should be struck from the Regional Commissioner's judgment in the petition. We believe the souce of beneficiaries' income is relative in this instance because the Petitioner has invoked the fund-raising activities directly into issue. The beneficiaries' remuneration is being derived from a fund-raising solicitation program which the Petitioner has designated as an integral part of his proposed training activities. 8 CFR 214, supra, provides that the source of the remuneration may be from a United States or foreign source. This latitude was given to permit the prospective trainee to receive a salary or living allowance while in the United States from either his foreign employer or United States host. The salary for the trainee is not a controlling factor or subject to local salaries or fair labor standards becuase the primary purpose of the beneficiaries' presence in the United States is to participate in and assimilate a substantial training program - a program well defined and tied to a specific time schedule and goal. We do not believe the statute relied on by counsel in addressing this issue precludes the Regional Commissioner from considering the alien's activities which result in a source of income for the Petitioner when, as in this instance, money is directly generated by the beneficiary-trainee and the Petitioner has designated such soliciting to be encompassed in his program.

We disagree with counsel in his analogy that denial of the petitions is a violation of the Petitioner's free exercise clause of the First Amendment. The petitions in question

were denied because the Petitioner failed to satisfactorily establish a bona fide training program within the interpretation of law. This conclusion by the Regional Commissioner does not in any way abridge the Petitioner's exercise of religious freedom.

Counsel has also criticized the Regional Commissioner for not according the Petitioner and the beneficiaries procedures under 8 CFR 103.2 which, as he states, are customarily utilized by the Immigration and Naturalization Service in determining the eligibility of aliens to the benefits of petitions and for change of status. Counsel comments in his memorandum that the Regional Commissioner by not offering the Petitioner and beneficiaries the opportunity to testify in person before a service officer has denied them, as a group or by individual, an opportunity to present their case with all desired exposure. It is our position that Service prerogative to not interview all prospective beneficiaries as requested by counsel did not pretermit the Petitioner from any avenue of information that he wished to pursue, and to submit the results of his inquiries by affidavit for consideration by the Regional Commissioner.

In view of the foregoing, it has been concluded the decision of the Regional Commissioner was proper and the material submitted on rebuttal of adverse information does not establish a basis for overruling that decision.

An amplification of counsel's memorandum does not rebut the substance or salient points of the Regional Commissioner's denials as detailed in his decisions of May 20, 1974 and August 21, 1974.

The Petitioner has not met the burden imposed upon him by regulation - Matter of Brantigan, 11 I. & N. Dec. 493 - nor has he shown that the (challenged) decision is without a rational basis or that it is arbitrary, capricious, or an abuse of discretion. Accordingly, the denial of the petitions will be affirmed and the appeals will be dismissed.

IT IS ORDERED that the appeals be and the same are hereby dismissed.

REGIONAL COMMISSIONER

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Northeast Regional Office
Burlington, Vermont

Files: NYC-N-43048 (New York)
NYC-N-43367 (New York)
NYC-N-43579 (New York)

In re: Petitions of Holy Spirit Association for the Unification of World Christianity a/k/a Unification Church in behalf of five hundred seventy-four (574) aliens, three (3) aliens and five (5) aliens respectively.

PETITIONS TO CLASSIFY ALIENS AS NONIMMIGRANTS PURSUANT TO THE PROVISIONS OF SECTIONS 214(c) AND 101(a)(15)(H) OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED.

IN BEHALF OF PETITIONER: David Carliner, Esq.
1709 New York Ave.NW
Suite 305
Washington, D.C. 20006

(Heard in Oral Argument)

These matters are before the Regional Commissioner on appeal from the denial of the petitions to classify the beneficiaries as nonimmigrant trainees under section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, as amended. Inasmuch as the facts in all three cases are similar, a single decision will be entered.

The petitions and accompanying documentation reflect that formal instruction and

missionary training will be conducted at the petitioner's facilities in Tarrytown, New York and Barrytown, New York to be followed by practical field experience at local church centers, mobile evangelical units and by special projects (i.e. revival meetings, church seminars for non-members, etc.) throughout the United States; that transportation to and from the United States as well as other basic needs of the trainees will be provided by the country from which the trainee is coming or in the event there are insufficient funds in the originating country, the International Missionary Training Program will aid in obtaining funds from other nations to provide for the missionary trainees' needs. The petitioner claims that the International Advisory Committee of the Church concluded that there is no location comparable to the United States for the training of missionaries. The petitioner asserts that training facilties were established in this country because of the following considerations:

> The Christian culture and heritage of the United States provide an excellent environment for missionary training.
>
> The great movement toward spiritual concerns in the United States provides the best atmosphere for training new missionaries.
>
> It is necessary to standardize training of all missionaries and church staff, and therefore one central program has been developed.

> Economic considerations also dictate one complete set of training facilities and one staff rather than many.
>
> It is necessary to train missionaries in the most international setting where there is a mixture of all possible races, religions, nationalities, and beliefs. This place is the United States.
>
> English is necessary for missionaries and is one common denominator for international missionaries from Europe and Asia and this is available in the United States.

In connection with the proposed training the instant petition for 574 aliens reflects a period of from 28 to 32 months required to complete such training whereas the other two petitions reflect that a period of 24 months will be required to complete the same training. The supporting evidence submitted by the petitioner indicates that the complete program is still being developed but basically it will consist of five levels of two months' study each interspersed with four periods of four months' field experience for a total duration of 26 months. There has been presented evidence in the nature of a general outline of the aims of the program, a roster of faculty members and instructors, a list of the textbooks utilized for training purposes and other pertinent information concerning the criteria which has been established to determine eligibility for acceptance as a trainee, the control maintained over such trainees and the requirements which each trainee must

fulfill in order to receive a certificate of successful completion. The overall study program has been set forth in detail as follows:

A. LEVEL 1

1. Divine Principle lectures
2. Bible study
3. VOC theory
4. Rev. Moon's speeches
5. Group and individual counselling
6. History of Christianity
7. Introduction to Philosophy
8. English
9. Sports

B. LEVEL II

1. Divine Principle Lectures
2. Bible study
3. VOC theory
4. Rev. Moon's speeches
5. Group and individual counseling
6. Public relations
7. Comparative religions
8. Unification Thought
9. English
10. Sports

C. LEVEL III

1. Divine Principle lectures
2. Bible study
3. VOC theory
4. Unification Thought
5. Rev. Moon's speeches
6. Group and individual counseling
7. New testament theology

8. Unified Economics
9. English
10. Sports

D. LEVEL IV

1. Divine Principle lectures
2. Bible stody
3. VOC theory
4. Unification Thought
5. Public relations
6. Basic church business practice
7. Unified Science
8. Bible source study
9. English
10. Sports
11. Individual leadership training (counselling and training directed at fulfillment of each trainees' newly assigned mission responsibility.)

It is noted the petitioner has stated that training consists of five levels of study although the detailed description of the courses to be offered reflects the academic program is actually divided into four levels. The petitioner states that in the entire program there is emphasis placed on the field experience portion of the training, both in time alloted and in examination, grading and final examination. It is asserted that while it may be sufficient for non-missionaries of various fields and professions to train primarily by lecture and examination, it certainly is not the case for missionaries; that each missionary must demonstrate capability to love and serve others, to the extent of great self-sacrifice, and these capacities are the result of actual life experience rather than by classroom or laboratory techniques alone.

The instant petition for 574 trainees was denied by the District Director on May 23, 1974. The other two petitions were denied on June 6, 1974. The District Director's decision in all three cases was as follows:

> The petitioner seeks to accord the several beneficiaries of your petition classification as trainees.
>
> On April 4, 1974 in connection with your petition NYC-N-42465 seeking similar classification for another beneficiary you were informend of the denial and its certification to the Regional Commissioner.
>
> By order of the Regional Commissioner dated May 20, 1974, the denial of the petition was affirmed. Inasmuch as the issues of the instant petition are exactly those of your prior petition it must be found that the decision previously reached, and of which you are aware, must apply to the instant petition.

The District Director's denial of these three H-3 petitions was based on the Regional Commissioner's findings in the case of Herman ten Bokkel Huinink, file NYC-42463, in which the petitioner's overall missionary training program was carefully examined. In our affirmation of the District Director's Decision, the following pertinent factors were mentioned.

(1) There is a serious question as to whether the petitioning church has an established training program inasmuch as they have, in a relatively brief period of time, altered the length of the proposed instruction, the nature of the training and the ratio of field experience to formal classroom studies. Moreover, the petitions call for 28-32 months' training whereas the program which has been outlined only covers an approximate 22-month period.

(2) The evangelistic mission of the Church requires its members to engage in lay missionary work. Inasmuch as a background of two years' church membership is required for participation in the proposed training in this country, the need for 1 1/2 years of additional field work has not been amply justified.

(3) The extent to which the missionary trainees have engaged in fund solicitation -- which has included the outright sale of merchandise -- is inconsistent with nonimmigrant visitor status and exceeds the bounds of training in such activity.

(4) No evidence has been furnished to establish the financial ability of the petitioning church to maintain its missionary trainees in the United States without utilizing their srvices in extensive fund-raising operations.

(5) The aliens were admitted to this country (or placed in a deferred inspection status) at different times for the specific purpose of undergoing missionary training. In view of the fact that no definitive information has been furnished as to their exact dates of entry and periods of authorized stay, the extent of the classroom and field work which they have accomplished to date,and when such training will actually be completed, it has not been substantiated that the petitioner has an established training program which is uniformly applicable to all beneficiaries.

It was concluded that the proposed training program was unrealistic and unacceptable since it would make the petitioner the sole determinative authority as to when each of the beneficiaries will have completed his training and the activities in which he may engage would be tantamount to placing this Service in the untenable position of abrogating its duties and responsibilities under the immigration laws.

In connection with the appeal from the denial of the instant petitions, counsel asserted in pertinent part as follows:

> Insofar as the decision is based upon the grounds set forth in the Regional Commissioner's Order in NYC-N-42465, the Petitioner urges that each of the grounds relied upon by the Regional Commissioner is error.

****

It is not correct to say that there are "conflicting representations" as to the nature and extent of the training required under the present petition. The petition involved in NYC-N-42465 indicated that 26 months were required to complete the instruction and training under the program as developed through the date of the petition. The records of the Service regarding earlier submissions by the Unification Church in March 1972, in January 1973, and during January 1974, are not submissions in support of the earlier petition and have not been used as submissions in support of the present petition.

(Footnote: The petition stated 24 months as the period required to complete the services or training but the detailed program of training submitted by the petitioner fixed the period as 26 months. The reference to 24 months appears to be an error. The present petition appears to state 28-32 months. This is also an error. The program is intended to be for 26 months.)

The fact that the Unification Church has expanded and revised the nature of its instruction and training does not indicate that the program is not "established" even were the statute and the implementing regulations to be interpreted to require "an established program." A program is not less "established" merely because it may be modified from time to time. All that is fairly required of an established program is that it be initiated and set on a firm basis. See Webster's Dictionary. An established program does not imply an unchanging one.

The material submitted by the petitioner, summarized in the Order of the Regional Commissioner in NYC-N-42465, meets the requirements of 8 CFR 214.2(4)(iii) to describe the "type of training to be given" (underlining supplied). The fact that the regulation itself refers to "training to be given" is itself an indication that there is no requirement that the program be previously established but only that there be a proposed training program.

In the context of the regulations, the description of the training appears to be relevant in determining the proportion of time that will be devoted to "productive employment," whether the instruction and the on-the-job training are reasonably related to the position or duties for which the training is intended, whether the training is available in the alien's country, and whether it is necessary for the alien to be trained in the United States. That information has been amply supplied by the petitioner. In this circumstance, reliance upon the assumed "conflicting representations as to the nature and extent of the training required to prepare the aliens for missionary work" is not, in itself, a proper basis for the denial of the petition.

The Regional Commissioner has also relied upon the fact that the the "petitioner has completely reversed the ratio of field experience to formal studies" and has concluded that the "proposed ratio of class studies to practical training" is "entirely unrealistic". No basis is set forth in the Regional Commissioner's Order for the conclusion.

The classroom instruction is intended to inculcate a deeper understanding of the principles of the Unification Church. The field experience is intended to provide specific on-the-job training for missionary activity. The ratio which has been established of training to education cannot fairly be said to be unrealistic when the Immigration and Naturalization Service approves on-the-job training programs for which there is no formal instruction content, but for which there is only supervised on-the-job training. Based upon this precedent, the petitioner should be able to obtain approval for proposed training programs which offered no educational courses of instruction. The District Director's determination in NYC-N-42465 seems to suggest as much when he relied upon a finding that the training offered is "more appropriate to a scholastic program rather rhan to a training program".

****

****

The Regional Commissioner has also relied upon an assertion that the beneficiaries have had a "background" of two years of church membership and concomitant experience as lay missionaries prior to coming to the United States."

To the petitioner's knowledge, there is no basis for such a finding in the record. The representations which have been made to the Immigration and Naturalization Service regarding the intended beneficiaries is that they have had indoctrination into the principles of the Unification Church, that they have been selected for further education

and for missionary training in the United States because of their dedication to the principles of the Church and because they have exemplified a devotion to the ascetic life which is required for a missionary in the Unification Church. None of them has had missionary activity comparable to the training and activity which they would obtain in the United States where there is freedom of religion and freedom to proselytize in a community which has diverse religious, racial, and ethnic groups. The proposed program of one and a half years for such field experience, which includes the living experience of the missionary group itself, is no greater than comparable periods of time allowed for exchange visitors, students, and for other persons who are acquiring specific skills and a living experience in the United States.

Accordingly, the finding that there is "insufficient justification for the grant of H-3 classification to enable (the intended beneficiary) to participate in more than one and one half years of similar field work in this country" is not supported by the record in the absence of any evidence, is arbitrary in view of a demonstrated need for such training, and is capricious in that it makes improper distinctions between missionary trainees and other types of trainees permitted to be trained in the United States.

The Regional Commissioner has found that the fund raising which is part of the trainees' field experience "transcends the normal

limits of training". The petitioner has not been informed of the evidence relied upon by the District Director which permits the Regional Commissioner to state that there is "outright sale of merchandise" as a part of the fund raising technique. The Unification Church is not engaged in the "sale of merchandise" in the sense in which commercial establishments are engagedin sales, or indeed, in the sense in which various religious orders sell various products, such as liquers. It has been represented that the exchange of tea, flowers, candles, peanuts and candy are symbolic acts for the church and that the funds received are in the nature of offerings comparable to those received by other denominations which offer religious objects to their parishioners and receive contributions, offerings and donations in return. Comparison should be made with the treatment of ministers,admitted to the United States to engage in evangelical tours, who are permitted to "be supported by offerings contributed at each evangelical meeting". See Foreign Affairs Manual, "Visas", 22 CFR 41.25 referring to aliens who are classifiable as B-1 nonimmigrants, contrary to the Regional Commissioner's statement that nonimmigrant aliens in B-1 status may not "engage in the solicitation of funds".

The Regional Commissioner has arrived at what is termed "the inescapable conclusion that the petitioner's current training program. . . has been designed primarily for fund raising rather than for training purposes". This conclusion apparently is based upon what is regarded as the "necessity for fund solicitation in the light of the fact that the petitioning Church -- with a total member-

ship of 10,000 of which 7,000 (are) "associate members" -- has committed itself to the support of the 575 H-3 beneficiaries, in addition to other nonimmigrants who had been admitted for training, for a period in excess of two years."

The governing regulation appears to preclude any consideration of the source of funds for the payment of the expenses of the trainees. 8 CFR 214(h)(4)(iii) states specifically that "the source of any remuneration received by a trainee ... (is) ... not material..." To the extent, therefore, that decision of the District Director and the Order of the Regional Commissioner are based upon assumptions regarding the source of the funds received by the trainees, the decision is in conflict with the regulation.

* * * * * * * * *

To the extent that the decision is based upon the fact that the trainees, in effect, are supplying their own source of support through the offerings they collect, the decision results in an arbitrary discrimination against the Unification Church. Note has been made earlier of the fact that ministers are permitted to participate in "evangelical tours" in the United States and to accept "offerings contributed at each evangelical meeting". The offerings which the present trainees receive are no different.

The Regional Commissioner has based his decision also upon the fact that the beneficiaries have been admitted to the United States as nonimmigrants at different times to undergo missionary training and because of the

fact that "no definitive information has been furnished as to their exact dates of entry and periods of authorized stay, their current whereabouts, the extend of the formal instruction and field experience which they have accomplished to date, and when their training will actually be completed".

This consideration appears to be premature. Section 248 of the Immigration and Nationality Act and 8 CFR 248 govern the procedures for change of status. They become operative insofar as the present beneficiaries are concerned only after the H-3 petition has been approved. Form I-506 is the proper form for obtaining information regarding the dates of entry, periods of authorized stay, nature of previous activity in the United States of the individual beneficiary. It is not information which is required on Form I-129B or otherwise by the Service for the adjudication of H-3 petitions. . .

To the extent that the decision is based upon claims that the intended beneficiaries have "substantially deviated from authorized training conditions and (the) program establishedby an H-3 petition" this aspect of the decision is similarly premature and is properly determined upon application for a change of status and upon evidence relating to each of the beneficiaries which would establish as to the individual involved whether he has, in fact, violated the conditions of his stay in the United States. It is plainly not proper to determine the eligibility of a group of H-3 trainees because of the assumed "deviations" of individual

trainees. Matter of Okamoto, 10 I. & N. Dec. 456, supports the petitioner. . .

In these circumstances it is not warranted to deny the present petition upon a rather flamboyant statement that the approval of the petition "would place (the) Service in the untenable position of abrogating its duties and responsibilities under the Immigration laws".

In support of the appeal counsel submitted an Income Statement for the period January 1, 1973 to December 31, 1973 prepared by the Treasurer of The Holy Spirit Association for the Unification of World Christianity reflecting that the church had a total operating income for 1973 of $11,863,028.31 derived from donations, candle offerings, contributions, book sales, membership fees and other revenue. No information was furnished concering the expenses or liabilities of the Church. Counsel also submitted the following letter dated May 9, 1974 from the Treasurer of the Church:

> This is to certify that all donations received by members in training in the United States are strictly accounted for by the following system.
>
> After the theoretical portion of the Unification Church Training Program, the trainees are required to have a "field experience", in which they travel through a five-state region. They conduct religious rallies, distribute Church literature, witness, hold Bible study classes and weekend seminars, conduct prayer meetings, and other similar activities. To sustain these activities, they receive donations; that is a part of the over-all training program.

> All members render their services to the Church voluntarily as an expression of their faith. The members do not receive any compensation, but are provided with the basic necessities - lodging and meals within the Church Center, traveling expenses and simple clothing, from funds provided by the Church. (The amount, allocation and needs being determined on an individual basis by the Center Director or Mobile Team Leader.)
>
> All monies received from donations are collected by the Center Director or Mobile Team Leader. The funds are then allocated throughout the region for basic upkeep and maintenance of the Centers and the spiritual programs. All Centers report to their Regional Director on at least a weekly basis. Each month the Regional Director report. to the National Headquarters in Washington, D.C. the total amounts received along with a summary of expenditures. Also, each region sends a substantial contribution to the National Headquarters for over-all programs.
>
> In the history of this Program, there has never been any evidence to suggest any "abuse" of this system of any type by individual members or teams.

Oral argument was heard in these matters at New York, New York on July 11, 1974. Counsel asserted that the District Director's decisions in the cases before us were based entirely on a prior case decided by the Regional Commissioner on May 20, 1974, and that the instant petitions were not considered on their own merit; that change in a program of training is not a basis for denial of the petition; that the

variance of two months in the length of the program is not significant; that in most cases of this type the aliens are outside the United States and that because a handful of aliens may have violated local ordinances or left the program early the others should not be considered in the same light; that some individuals accelerated through the program and were placed in the field before others and that the ratio of education andtraining has now been changed to require trainees to spend one-third of their time pursuing the educational portion of the program and two-thirds to be spent in on-the-job training. Counsel pointed out that the Service has approved many petitions for trainees where there was no educational program whatever. It was stated that the training program to be followed by the many beneficiaries is a living experience involving persons of inter-religious cultures and multi-ethnic backgrounds; that it is the desire of the Church to harmonize all religions; that experience is gained by setting up centers of training, working on a one-to-one relationship in the community and through such experience and proselytizing they become trained; that such training is necessary and the Service has no basis for concluding that a one-third and two-thirds ratio is not proper.

In dealing with the matter of fund raising, counsel asserted that this facet of training is not a primary activity but is incidental to witnessing meetings and discussions; that it is the view of the Church that there is no sale of items or merchandise and that such items are merely a a symbol and utilized as a tool in training persons to be humble and allow them to identify with God. In connection with the matter of fund raising counsel submitted a copy of an article

entitled "Heavenly Fund Raising" and also a copy of a paragraph entitled "The Principle of Restoration Through Indemnity" taken from the "Divine Principle", one of the primary texts utilized by the trainees in their educational program.

It has also been asserted by counsel that no one exists without money; that the raising of funds is not an improper activity and that the training of persons to raise funds is also not improper; that because Americans are recognized for their generosity towards religious and philathropic organizations, the Church brings aliens here in order that they can learn how Americans give, and training for such purpose is not invalid; that clergymen come from other countries and it is not inappropriate for them to appeal for offerings; that because the beneficiaries use a more personal approach or an individualized,appeal; it should not be found to be improper.

In reply to the contention that the Service would lose control of the aliens it was asserted that the Headquarters of the Church in Tarrytown, New York knows where these individuals are at all times; that they can be requested to appear when and as required; that following the approval of the instant petitions the aliens would be admitted for a period of one year; that the Service would maintain control over each person and any violation of status could be dealt with on an individual basis.

Counsel pointed out that the Service was incorrect in assuming that the members of the church abroad had previous missionary training. To the contrary, counsel asserted that these individuals had been members of the Church

abroad but none had ever been given any specific missionary training which can only be accorded in this country.

The record contains a letter dated March 1, 1974 from the Missionary Visa Office of the Unification Church in New York, New York addressed to our Service in that city which lists the names of four alien missionary trainees who, it is claimed, have already received H-3 classification. Counsel was unable to furnish any information concerning these four individuals. Counsel was also unable to furnish any further information concerning the financial status of the petitioner. Counsel advised that he would obtain and forward the pertinent data within ten days. At his request counsel was subsequently granted until July 30, 1974 to furnish the additional information.

The additional evidence requested has now been received and counsel asserts that the four missionary trainees mentioned above were the beneficiaries of H-3 petitions approved by the District Director of this Service in Washington, D.C. In this connection it has been ascertained that H-3 petitions were approved as claimed by counsel. The relating files in two cases have been sent to the Federal Records Center and the two files still available reflect petitions were approved August 22, 1973 to expire January 18, 1974. The records fail to indicate that these aliens have been granted any extensions of temporary stay or that they have ever departed from the United States. It is now clear that petitions have been approved by this Service for a total of sixteen trainees. No useful purpose would be served in determining at this time whether these

petitions were based on the same set of circumstances or if the training programs were similar. It was mentioned in our decision of May 20, 1974 in the case of Herman ten Bokkel Huinink that the H-3 petition approved in 1972 for 12 Japanese aliens -- who were then abroad -- called for only nine months of classroom work and three months' field experience. In way of response, counsel has merely argued that the missionary training program has been constantly undergoing revision. Under the circumstances, we will consider the instant petitions on the basis of the records at hand.

Counsel has furnished additional financial evidence prepared by one William E. Torrey on behalf of the petitioning church. Listed as current assets are such items as "Cash in Bank(s)" amounting to $26,272.00 and "Cash on Hand" of $900.00. Fixed Assets including vehicles, trailers and furnishings have a declared value of $258,722.00 and ten pieces of property are valued at $1,799,450. There has been included a new Income Statement which shows the total operating income for 1973 to have been $2,133,028.31 as compared with $11,663,028.31 reflected in the documentation submitted earlier with the appeal brief. A comparison of the two statements follows:

INCOME STATEMENT
January 1, 1973 to December 1, 1973

	First Statement	Second Statement
Operating Income		
Donations Unification Church of America National Fund Raising Projects (candle offerings)	$7,341,131.64	$ 341,131.64
	1,663,930.49	663,930.49
International Training Center Fund (Shown in first statement as "Overseas Contributions")	675,000.00	675,000.00
Other Contributions	1,272,381.19	272,381.19
TOT. DONATIONS	$10,952,443.32	$1,952,443.32
Book Sales	590,396,97	90,396.97
Membership Fees	32.650.00	2,650.00
Other Revenue (Loans, Van receipts, etc.)	87,538.02	87,538.02
TOTAL OPERATING INCOME FOR 1973	$11,663,028.31	$2,133,028.31

At this point we are confronted with two different statements purporting to have been the petitioning church's operating income for 1973. The first statement submitted on appeal showed a total income of $11,663,028.31. The latest such statement submitted reflects substantial reductions in donations received, income from book sales and membership fees to the point that the operating income for the same period was only $2,133,028.31. The latest statement reflects a reduction in operating income amounting to $9,530,000 which has not been explained. Under the circumstances, we find the credibility of the gross income reported (as required by Item 4 of the Form I-129B) to be very much in doubt.

In further reviewing this matter, we must express disagreement with counsel's contention that consideration of the beneficiaries' current stay in the United States should be divorced from the adjudication of the instant petitions and reserved for section 248 proceedings. In determining whether the petitioning Church has established a bona fide and realistic training program, we must examine the aliens' previous background in the field. These petitions cannot be isolated from the circumstances which caused them to be filed, the activities in which the beneficiaries engaged to date, and the need for their continued presence in this country. The aliens who are all presently in the United States were brought here as nonimmigrant visitors for missionary training, the same purpose for which H-3 classification is now being sought in their behalf. We cannot, at this juncture, accord blanket approval to a program which they have already completed to

varying degrees. Insofar as the instant beneficiaries are concerned, we certainly cannot regard the missionary training program as prospective in nature.

The petitions at hand seek to encompass into the training program 582 aliens who have been admitted to this country as nonimmigrants at different times to undergo missionary training. As pointed out in our previous decision in the case of Herman ten Bokkel Huinink, we have not been furnished any information concerning their dates of entry and periods of authorized stay, their current whereabouts, the extent of the formal instruction and field experience which they have accomplished to date, and when their training will be completed. Although we are not in possession of specific data it is evident that the majority of the alien beneficiaries have remained in this country beyond their authorized admission and/or extension period. There is a serious question as to whether many of them would even be eligible for change of nonimmigrant status under the provisions of section 248 of the Act. The instant petitions seek to further perpetuate their stay without specifically setting forth the exact nature of the additional training to be accorded them or any justification for same. We do not find the Church has satisfactorily shown it has a program which is uniformly applicable to all beneficiaries.

In connection with the proposed training,the petitioner furnished an outline of the study and field program set up for the beneficiaries. This information is identical to that initially furnished with the petitions filed in behalf of Herman ten Bokkel Huinink. However, in connection with certification in the above

case counsel furnished additional evidence and submitted a more comprehensive outline of the missionary training program which consistes of 24 weeks of study and 72 weeks of field experience or a total of approximately 22 months. This revised program was described in detail in our first decision covering the one beneficiary. Counsel now asserts that regardless of all prior consideration, outlines, or statements, the aliens will require a period of 26 months to complete their training. In view of the conflicting representations as to the nature and extent of the training required to prepare the aliens for missionary work, we do not find that the Church has an established training program. We also find the proposed ratio of class study to practical training to be entirely unrealistic. It is also abundantly clear that the petitoner's current training program, which calls for three times as much field work as formal study, has been designed for fund raising rather than for training purposes.

We have carefully examined the fund solicitation phase of the proposed training. Cognizance has been taken of the provisions of 8 CFR 214.2(h)(4)(ii) which states that the source of any remuneration received by the trainee and whether or not any benefit will accrue to the petitioner are not material, but a trainee shall not be permitted to engage in productive employment if such employment will displace a United States resident. The regulation, as promulgated, intended to limit the scope of Service inquiry in bona fide trainee situations and did not envision the unique circumstances which presently confront

us. The beneficiaries herein are "unpaid" volunteers and, therefor, the domestic labor market faces no threat. Nevertheless, these aliens are involved in large-scale fund raising activities which cannot realistically be regarded as necessary to their missionary training. Although the petitioner would have us believe that such activity is only a small part of the field experience, the amount of money raised, the house to house and on the street method of solicitation and the nation-wide scope of the fund raising activities belie such claim. It also brings up a serious question as to whether productive employment -- which cannot be regarded as incidental to missionary training -- is involved. This fund raising not only provides the beneficiaries directly or indirectly with the means for their support but is absolutely essential to finance the purported mission of the Church. Therefore, we regard such extensive solicitations as productive employment both in violation of nonimmigrant visitor status and beyond the pale of H-3 trainee classification. Furthermore, counsel on one hand asserts that beneficiaries have not been missionaries heretofore but have merely been Church members for two years who have been selected for lay missionary training in the United States. On the other, he seeks to justify the fund solicitations as being permissible in accordance with the Department of State's grant of B-1 status to ministers of religion who will be maintained through offerings. We must point out that the statute does not define "minister of a religious denomination" but the regulations (22 CFR § 42.25) declare that this term means a person duly authorized by a recognized religious sect or denomination to conduct religious worship, and to perform other duties usually performed by a

regularly ordained paster or clergyman. Lay preachers not authorized to perform the duties usually performed by a regularly ordained pastor or clergyman of such denomination, and others such as cantors, lay brothers, or nuns do not come within this definition.

In addition to the above, it has not been satisfactorily established that the nature and amount of training which it is proposed to accord the beneficiaries in this country will actually prepare them to perform their missionary functions abroad. The petitioner has admitted that the United States is ideally suited for such missionary work. It has been asserted that the people of most other countries in the world are not receptive to public solicitation of funds and that only in this country can trainees develop the expertise needed to carry out their mission. The statute involved here was designed to accomplish the training of alien nonimmigrants in order that they could utilize the benefits of that training in a foreign country. The intent of Congress as expressed in the definition of a nonimmigrant trainee in Section 10(a)(15)(H)(iii) is clear. The petitioner readily admits that the practice of public fund solicitation is frowned upon by people of most other countries and it has not been shown that any fund raising techniques or related knowledge acquired in the United States will be utilized by these aliens when they return to their respective native lands.

In view of all the foregoing, it is concluded that the training program which has been proposed by the petitioner is not within the provisions of the statute or regulations. Accordingly

the denial of the petitions will be affirmed and the appeals will be dismissed.

IT IS ORDERED that the appeals be and the same are hereby dismissed.

/s/ _____
REGIONAL COMMISSIONER

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Northeast Regional Office
Burlington, Vermont

May 20, 1974

File: NYC-N-42465 (New York)

In Re: Petition of Holy Spirit Association for the Unification of World Christianity a/k/a Unification Church in behalf of Herman ten Bokkel Huinink

PETITION TO CLASSIFY ALIEN AS A NONIMMIGRANT PURSUANT TO THE PROVISIONS OF SECTIONS 214(c) AND 101(a)(15)(H) OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

IN BEHALF OF PETITIONER: David Carliner, Esq.
1709 New York, Ave., NW
Suite 305
Washington, D.C. 20006

(Heard in Oral Argument)

This matter is before the Regional Commissioner on certification by the District Director who denied the visa petition to classify the beneficiary as a nonimmigrant trainee under section 101(a)(15)(H)(iii) of the Immigration and Nationality Act. Although the instant petition relates to only one alien, cognizance has been taken of the fact that there is an identical petition (NYC-43048) currently pending for 574 beneficiaries and that others may follow. Under the circumstances, we will not limit our consideration to this one particular beneficiary but will make our decision sufficiently broad enough to encompass both present and any prospective petitions.

The Unification Church was founded in 1954 in Seoul, South Korea by Rev. Sun Myung Moon and is based on the tenets of The Divine Principle, the product of Rev. Moon's years of research and revelations. The church has been described as a rapidly-growing ecumenical, interfaith, evangelical movement located in forty countries, with an international membership estimated between 500,000 and one million persons. In the United States, the petitioning church is stated to have about 10,000 members, with "a core group of approximately 3,000 full-time missionaries." The petitioner seeks H-3 classification for the alien beneficiaries for the stated purpose of preparing them for lay missionary work abroad. This goal is to be accomplished by formal lecture courses in the theology and ideology of the church and by practical application of theory and principles through field experience.

The petition and accompanying documentation reflect that formal instruction will be conducted at the petitioner's facilities in Tarrytown, New York and Barrytown, New York, to be followed by field experience at local church centers, in mobile evangelical units, and by special projects (i.e., revival meetings, seminars, etc.) in the church's ten regions in the United States; that the aliens will not receive any pay during their stay in this country, but the petitioner will assume full responsibility for their transportation, food, clothing and other needs. The decision of church officials to centralize the training of its missionaries in the United States has been ascribed to the economic and practical advantages to be achieved by standardization

of instruction, the utilization of one teaching staff, and the sense of unity and intercultural understanding to be derived from a common training site. Additionally, it was felt that this country was best suited for training purposes by reason of its Christian culture and heritage, spiritual concerns, international mixture of races, religions, nationalities and beliefs, use of the English language as a common denominator, and the location of the United States as a natural geographic bridge between the East and West.

In connection with the proposed training, petitioner initially advised that the complete program itself is still being developed; that basically it will consist of five levels of two months' study each interspersed with four periods of four months' field experience for a total duration of 26 months. There has been presented evidence in the nature of a general outline of the aims of the program, a roster of faculty members, guest lecturers and consultants, a list of reading material utilized for training purposes, the character evaluation and achievement record maintained on trainees, a copy of the instructions issued to alien missionary trainees, and other pertinent information. The overall training program has been set forth in detail as follows:

"Level 1 (12 weeks)

Orientation	Hrs/Week
Courses:	
Divine Principle I ..... (includes Old and New Testament readings, basic theology, prayer and conditions for spiritual growth; marriage and the family)	20
Witnessing, Teaching and Communication Skills....	5
Conversational English	5
Managing Time, Resources and Finances	1

Level II (36 weeks Field Experience)

Training Experience: (as member of a local church center or mobile team)

Witnesses on campuses, parks and other public meeting places

Helps to plan, publicize and conduct weekend seminars on Divine Principle and Christian Living

Participates in financial assistance training experiences

Participates in selected projects and activities of the civic community

Completes assigned readings

Participates in planning and evaluation of daily experiences under direction of team leader or center director

Participates in Sunday worship service and daily prayer meetings

Level III (12 weeks)	Hrs/Week
Orientation and Review of Field Experience	
Courses:	
Divine Principle II	10
Unification Thought.....	7
Critique of Communism	7
Religious Reawakening Today..	1
Witnessing, Teaching and comm. Skills	5

Level IV (36 weeks Field experience)

Training Experiences: (as member of evangelical team or other international mobile missionary unit)

Assists with planning and conducting revivals, special programs

Speaks to and works with groups (more than with individuals)

Assists with arranging and preparing for use of communications media

Conducts worship services and prayer meetings and gives sermons

Participates in financial assistance training experiences

Interviews or otherwise interacts with community leaders

Attends daily discussions of learning experiences with team leader or center director

Completes assigned readings

Final one week seminar and examination"

The records of this Service reveal that an H-3 visa petition was filed by The Unification Church, Washington, D.C. on March 30, 1972 in behalf of twelve Japanese beneficiaries to accord them one year of religious training for lay ministry work. The petition was approved on June 7, 1972, valid to June 7, 1973. However, the instant petitioner advised on March 1, 1974 that these aliens - the first missionary trainees ever brought to the United States by the church -- were to have received H-3 classification but when they arrived in this country on June 22, 1972 were admitted as non-immigrant visitors for business; that there are presently only four missionary trainees in the United States who have been granted H-3 status. Insofar as the beneficiaries of the

visa petitions now pending before this Service are concerned, all are purportedly undergoing training in this country by virtue of having been admitted as temporary visitors for business or pleasure (B-1 or B-2) prior to the filing of the H-3 petitions, or having been paroled into the United States pending determination of their status.

The record further reveals that many of the beneficiaries -- as well as other aliens not currently covered by an approved or pending H-3 petition -- were located in various towns and cities throughout the United States engaged in the sale of such merchandise as tea, flowers, candles, peanuts and candy in shopping centers, on the streets, and on a door-to-door basis, and soliciting donations on behalf of the Unification Church. In a number of instances, arrests by police authorities resulted because the solicitation of funds was in violation of local ordinances. Some of these aliens had been in this country less than a few weeks' time, one such individual having been admitted about one week earlier. Many of the aliens encountered by Service officers were found to be in the United States unlawfully by reason of having remained here beyond their authorized period of stay.

The instant petition was denied by the District Director on April 5, 1974 on the grounds that the petitioner has failed to specifically or adequately describe the training program; that the first phase of the training, which consists of classroom

instruction, practice teaching and public speaking, is more appropriate to a scholastic program rather than to a training program as contemplated by section 101(a)(15)(H)(iii) of the Act; that approval of the petition would, in effect, permit the petitioner to circumvent the regulations governing the admission of nonimmigrant students; that the second phase of the proposed program -- during which the beneficiary would acquire experience in the field -- consists, in part, of fund-raising by solicitation on the street; that this aspect of the program is a condition of employment not usually found in bona fide trainee situations; that, moreover, the petitioner has not established that the trainees engaged in soliciting funds would receive sufficient supervision to prevent possible abuses inherent in such activity; that this Service is not bound by the somewhat similar petition which had been previously approved. It was concluded that the petitioner has failed to establish that the offer to the beneficiary is essentially an offer of training as contemplated by the statute.

In connection with the certification of the case to this office, counsel has submitted a brief in support of the petition in which he has contended that the training offered is an "international missionary training program" which is not prohibited by the statute or the legislative history which led to the enactment of the nonimmigrant trainee provision. As for the specific

grounds for the District Director's denial of the petition, counsel has asserted the following:

"(a) The first ground is that the petitioner 'failed to specifically and adequately describe the training program of its organization'.

This finding is patently without support in the record. The submission of petitioner sets forth courses of study at four levels listing each subject in which the trainees are to receive instruction. In addition to the listing of the courses, the materials indicate that the training program would include classroom lectures, group discussions and seminars, group and individual counselling, and international inter-religious and inter-racial living situations, and practical field experience in church centers, evangelical mobile units, and other field projects.

The submission by the petitioner fairly meets the requirements of 8 C.F.R. 214.2(h)(3)(iii) requiring a description of the type of training to be given: Hours of classroom instruction and on-the-job training, the position and duties for which the training is intended, and the need for training within the United States.

(b) The second ground set forth by the District Director is that the 'first phase of the proposed training...is more appropriate to a scholastic program rather than

to a training program'. In making this observation, the District Director has artifically distinguished between a 'scholastic program' and a 'training program'. A training program necessarily involves instructions in a subject matter whether for training 'international foreign traffic clerks' (see Matter of International Transportation Corporation, 12 I&N Dec 389) Orchard Work; see Matter of Saunders, 10 I&N Dec 647, or for Missionary Training. Aliens who are being trained under the program offered by the petitioner are not analogous to F-1 non-immigrant students since the training which they receive is not in an 'educational institution' within the meaning of the requirements of 8 C.F.R. 214.3(e) and is solely for the purpose of receiving training in missionary activity for the Unification Church and not for a general educational program. The approval of the present petition would in no way circumvent the regulations relating to the admission of non-immigrant students since the intending trainees would not appear to be admissible to participate in the program of the Unification Church at Tarrytown, New York as non-immigrant students.

(c) The District Director has based his decision also upon the isolated fact that the field experience consists 'in part of fund raising by solicitation on the street.'

This gratuitous observation is derived from no material set forth in the record. The submission of the petitioner sets forth

that the field experience will include: local churches and mobile units, witnessing, street preaching, classroom lecturing, seminars, workshops, fund raising and occasional special projects, such as revival tours.

To the extent that fund raising is conducted on the street, this activity is in the form of requesting offerings to the church. It is not dissimilar to similar activities by other denominations conducted on-the-street and from door-to-door. Their activity is incidental to a larger program of witnessing, street preaching, and lecturing.

The consideration of the source of funds received by the Unification Church, or indeed, by its trainees is not an appropriate factor in denying the petition. 8 C.F.R. 214.2(h)(4)(iii) states specifically that 'the source of any remuneration received by a trainee... (is)...not material...'. Reliance upon consideration of 'fund raising by solicitation on the street' is therefore an improper basis for the District Director's decision.

(d) The District Director has also found that the petitioner has 'not established that the trainees engaged in soliciting funds would receive sufficient supervision to prevent possible abuses inherent in such a situation'. The finding fails to specify the nature of the abuses which are said to be inherent in the solicitation of funds. Fund raising, of course, is common to all religious denominations. Although history is replete with

examples of abuses by churches in their method of soliciting and their application of funds, it is too much to say that the fund raising activities of churches, whether by solicitation within the church, on-the-street, or door-to-door is subject to any greater abuse than the collection and disbursement of funds by other fields of endeavor including those involved in governmental as well as those involved in commercial fields.

Nonetheless, contrary to the finding of the District Director, the Unification Church has developed a program, established in the record, which will reasonably assure appropriate methods of fund raising and the use of funds raised in accordance with the tenets of the Unification Church.

One of the underlying motifs of the training program is to 'develop missionaries' who are capable of leading others by their dedication and sacrifice for others to recognize the qualities of truth, beauty, love and goodness within themselves and others. The training is provided initially in the courses of study which focus on the theology of the Unification Church, specifically the lectures on the Divine Principle, Unification thought, prayer and spiritual life, as well as through individual and group counselling. The training is also provided in the field experience in living and working in a religious atmosphere in which 'each missionary must demonstrate capability to love and serve others to the extent of great self sacrifice'.

Witness is borne to the self sacrifice inherent in the training program by the fact that the missionary-trainees are required to live a life of denial with minimum subsistence in which they are provided no individual income.

(e) Neither is it correct to say that there is no supervision. A rigid discipline is imposed upon each trainee through the mutual interaction of the individuals involved in teams of 10, divided into trinities of three, directly supervised by a team leader, and in supervision of a larger group of 70, which functions under the close observation of responsible persons within the Unification Church. Where there is a 'failure to maintain good character consistent with the beliefs of the church,' the program requires the removal of the trainee from the program with 'subsequent notification' to all proper authorities as to his change in status. Such notification includes notification to the Immigration and Naturalization Service as to the status of any alien within the program inasmuch as the specific program offered by the Unification Church requires disciplinary action for failure to comply with the applicable laws of the United States.

In these circumstances, it cannot be fairly said that there is no program of supervision. The program of supervision indeed appears to be greater than that required practiced by other fields of endeavor for which H-3 non-immigrant trainees have been approved in the commercial fields."

Oral argument was heard in the matter at Burlington, Vermont on May 9, 1974. In addition to counsel, also representing the petitioner was Mr. Michael Y. Warder, Director of The Unification Church's recently established Immigration Department. Inasmuch as argument was somewhat lengthy in nature and included many aspects of the petitioning church's doctrines and philosophies which are not at issue, or have already been covered by counsel's brief, we will limit our consideration of the matters discussed to those additional factors which bear directly on the proposed training program.

It was stated in oral argument that there are 698 nonimmigrants and about 150 United States citizens presently undergoing missionary training in the United States and another 225 aliens who are abroad waiting to participate in the program; that the training which these beneficiaries previously had as lay ministers abroad was based on an abridged version of The Divine Principle and did not include other areas of study encompassed in the current training program; that the Unification Churches in the various foreign countries were responsible for selecting those individuals (who had been church members for the required two years) sent here for further missionary training; that the recently acquired church facility at Barrytown, New York (formerly the Christian Brothers Training School) -- which can accommodate up to 300 persons -- has not yet been utilized for training purposes; that there are currently

75 trainees in attendance at the Belvedere Estate, Tarrytown, New York (which can handle a maximum of 135 individuals), very few of whom are aliens; that instruction is given in the English language and, since some of the trainees are not conversant in English, they are accorded five hours of language instruction per week in addition to the time they may devote on their own in this regard; that the overall training program is flexible and completion of the lecture phase of instruction varies with the person's progress; that a trainee could possibly be sent into field work with as little as one week of formal study, provided he passes the requisite examination in The Divine Prinicple; that the more qualified individuals are also accorded leadership training.

It has been further asserted in oral argument that the training program, which brings together persons of diverse religious and ethnic backgrounds, has a puritan moral tone and urges austerity, self-sacrifice and love as high personal qualities; that the field work part of the program is multi-faceted and not intended primarily for fund solicitation purposes; that fund raising, which is an accepted and necessary church practice, seeks to provide the trainees with the knowledge and experience to finance the operation of churches in their own countries; that it is a very small part of the field work which also includes preaching, witnessing, workshops, seminars, etc., that the exchange of articles in return for financial contributions is not intended as a commercial sale of merchandise; that some of the items, such as candles and candy, are

symbolic of church doctrines; that the trainees are basically law-abiding and instances where local ordinances have been violated are isolated; that church members are under instructions to seek permission of the police or other municipal authorities prior to engaging in fund raising, although normal gatherings are permitted under the Constitution.

In addition to the foregoing, it has been stated that 75 aliens have completed their training and returned abroad and only six have applied to remain permanently in the United States; that the twelve Japanese aliens who were beneficiaries of the first H-3 visa petition -- and were subsequently admitted in June 1972 as temporary visitors -- are still undergoing training in this country; that the beneficiaries of the petitions presently pending before this Service are engaged in various phases of field work at different locations throughout the United States; that their exact whereabouts can be ascertained through the petitioner's United States Headquarters in Washington, D.C.; that the financial ability of the Unification Church to provide for trainees is evidenced by the fact that none have been obliged to engage in gainful employment and by the purchases of costly properties for training purposes.

At the time of oral argument, a voluminous amount of documentation was furnished which reflects the many honors bestowed upon Rev. Moon by various states, cities and towns

throughout the United States, the recognition and expressions of appreciation which he and the work of the Unification Church have received from federal, state and municipal officials, and the overall favorable publicity accorded Rev. Moon's appearances by different newspapers and periodicals. In addition, there was furnished evidence that the petitioning church has sought and obtained advance permission from numerous city and town authorities prior to engaging in fund solicitation.

The entire record in this case, including the representations made in oral argument and the evidentiary material furnished therewith, has been very carefully considered. It should be stated at the outset that it is neither our intention or desire to take issue with the principles upon which the Unification Church was founded, to question the intense devotion which its members have shown to their spiritual leader, or to challenge the trainees' wholehearted dedication to the work of the church and the lay missionary duties which they have assumed. We are only concerned in this proceeding with determining whether the petitioner has an established and realistic training program, if it is appropriate to accomplish the purpose for which it is intended, and whether it is in conformity with the immigration laws and regulations.

The records of this Service reveal that the initial H-3 petition filed for twelve Japanese beneficiaries in March 1972 outlined one year

of lay ministry (missionary) training, nine months of which would be classroom study and related independent research and three months of which would be supervised in-the-field experience. The effort of the petitioning church to bring members of its foreign branches to the United States for missionary training received its greatest impetus in January 1973 when more than 100 aliens from various European countries arrived on a charter flight and were admitted as nonimmigrant visitors for such purpose. At that time, their itinerary called for them to remain in this country for about one year, devoting two weeks to orientation and training in Tarrytown, New York and thereafter spending approximately one month, on a rotation basis, at each of the church's twelve major centers throughout the United States. On January 1, 1974, Neil A. Salonen, President of the Unification Church, informed this Service that their missionary training program consists of a two-year course of intensive study and practical experience in the mission field; that approximately sixteen months of this time is spent in classroom training, practice teaching and public speaking, with the remainder of the time being devoted to actual field experience. Nevertheless, letters were subsequently sent by Mr. Salonen abroad to prospective trainees on January 7, 1974 informing them that their stay in the United States would be for approximately twelve months. The H-3 petitions currently pending before this Service reflect that the beneficiaries will require 28-32 months to complete the training. However,

the International Missionary Training Program which has been presented calls for 24 weeks of orientation and classroom studies and 72 weeks of field experience, or approximately 22 months of overall training. The additional six to ten months' time which the aliens will spend in this country has not been explained.

In view of the conflicting representations as to the nature and extent of the training required to prepare the aliens for missionary work, we do not find it has been substantiated that the church has an established training program. It is particularly noted that the petitioner, in a brief span of a few months has completely reversed the ratio of field experience to formal studies. It was initially indicated that the aliens would devote twice as much time to lecture courses as compared with field work. The program now calls for them to spend three times as much time in the field as in the classroom. Although we recognize that the petitioner is not seeking acceptance of its training facilities as approved institutions of learning for nonimmigrant students, we nevertheless find the proposed ratio of class study to practical training to be entirely unrealistic. Moreover, the beneficiaries have had a background of two years of church membership and concomitant experience as lay missionaries prior to coming to the United States. We find insufficient justification for the grant of H-3 classification to enable them to participate in more than one-and-one-half years of similar field work in this country. Matter of Miyazaki Travel Agency, Inc. 10 I. & N. Dec. 644 and Matter of Sasano, 11 I. & N. Dec. 363.

We have also considered the issue of the petitioner's inclusion of fund raising -- which encompasses the outright sale of merchandise -- as part of the trainees' field experience. We do not dispute the right of any recognized religious or charitable organization, including the instant petitioner, to lawfully engage in the solicitation of funds. However, the employment of nonimmigrant aliens for such purpose is not consistent with B-1 or B-2 status, or with the stated intention of the pending H-3 petitions. Even conceding arguendo that instruction in fund raising is important to a missionary's training, the manner and extent to which the instant beneficiaries have been utilized towards that end transcends the normal limits of training.

We have considered the necessity of fund solicitation in the light of the fact that the petitioning church -- with a total membership of 10,000 of which 7,000 have been described in oral argument as "associate members" -- has committed itself to the support of the 575 H-3 beneficiaries, in addition to other nonimmigrants who have been admitted for training, for a period in excess of two years. No evidence has been furnished to substantiate the petitioner's financial ability to assume this obligation and even the basic information relative to its gross annual income has been omitted from Item 4 of the petition, Form I-129-B. At the time of oral argument, the petitioner's representative advised that the church would not entertain any suggestion that fund raising be eliminated as part of the

training program. Despite the assertion that such solicitations are only a small part of the overall field experience, information received from various Service Officers throughouth the United States substantiates that the beneficiaries have been widely and repeatedly engaged in such pursuit. We are led to the inescapable conclusion that the petitioner's current training program, which calls for three times as much field work as formal study, has been designed primarily for fund raising rather than for training purposes.

In addition to the foregoing, we find that the pending petitions seek to encompass into the training program 575 aliens who have been admitted to this country as nonimmigrants at different times to undergo missionary training. No definitive information has been furnished as to their exact dates of entry and periods of authorized stay, their current whereabouts, the extent of the formal instruction and field experience which they have accomplished to date, and when their training will actually be completed. Although it is claimed that all of these aliens are still undergoing training, it is evident from the petitioner's European and Asian Personnel List of January 1974 that the overwhelming majority have remained here beyond their authorized admission and/or extension period. The pending H-3 petitions seek to further perpetuate their stay without specifically setting forth the exact nature of the additional training to be accorded them and corroborating the need for same. It has been held that substantial deviation from authorized training

conditions and program established by an H-3 petition violates such status and renders the trainee deportable under section 241(a)(9) of the Act. Matter of Okamoto, 10 I. & N. Dec. 456. The instant petitioner has attributed deviations from the training program to "flexibility" and to the fact that it is constantly undergoing revision. The church has not satisfactorily shown that it has an established program which is uniformly applicable to all beneficiaries.

It is our view that approval of the petitions under the above circumstances would be tantamount to establishing the petitioning church as the sole determinative authority as to when each of the beneficiaries will have completed his training and the activities in which he may engage. This would place this Service in the untenable position of abrogating its duties and responsibilities under the immigration laws. It is concluded that the training program which has been proposed by the petitioner is unrealistic and unacceptable. Accordingly, the denial of the petition will be affirmed.

IT IS ORDERED that the District Director's decision denying this petition be and same is hereby affirmed.

/s/
REGIONAL COMMISSIONER

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

JAN 14, 1977

File: A21 792 001 - New York

In re: KEIKO ASAI, ET AL (42 cases)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: David Carliner,Esq.
Suite 931
1511 "K" Street, NW
Washington, DC 20005

ON BEHALF OF I&N SERVICE: Paul C. Vincent
Appellate Trial Attorney

Allan A. Shader
Trial Attorney

ORAL ARGUMENT: March 26, 1975

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2) - Nonimmigrant - remained longer than permitted (A11)

APPLICATION: Termination of the proceedings; alternative, voluntary departure

On November 11, 1974 the immigration judge found the respondents deportable as nonimmigrant overstays. The respondents appealed. It is their contention that they are still in the nonimmigrant status in which they were admitted, that their time has not expired, and consequently, that they are not deportable. Their appeal will be dismissed.

The record relates to the cases of 42 aliens who were admitted to the United States as nonimmigrant visitors. While the individual dates of admission and periods for which they were admitted vary, none of the respondents was admitted for a period beyond September 20, 1974.

The respondents are all members of the Unification Church, which brought them to the United States. It was the desire of the Church that the respondents (and other nonimmigrants that it brought here) be able to remain in the United States for a longer period than that for which they had been admitted to stay as visitors. In order to explore how to accomplish that objective, representatives of the Unification Church met with officials of the Immigration and Naturalization Service during January and February of 1974. During the course of the discussions, Service officials suggested that the subject aliens might qualify for a change of nonimmigrant status to that of trainees under section 101(a)(15)(iii) of the Act. As a result of the discussions, the Unification Church filed petitions to accord the respondents (and others) status as nonimmigrant trainees.

The Service, however, did not approve the petitions. On May 23, 1974 the District Di-

rector denied the petitions and certified his decision to the Regional Commissioner. Thereupon, in some cases, applications to extend the nonimmigrant visitor status of the respondents were filed. These were also denied. In the case of Keiko Asai, for example, an application for extension was received by the Service on June 24, 1974 and was denied on September 5, 1974.

In regard to the denials of the visa petitions, the Regional Commissioner affirmed the denials on August 21, 1974. An appeal from that decision was taken to the United States District Court of Washington, D.C., which remanded the cases to the Regional Commissioner for further consideration and a new decision.

Meanwhile, the Service commenced these proceedings. When this appeal was originally before us, we were informed that the Service did not intend to enforce the departure of the respondents "unless and until there are final administrative denials of the petitions after proceedings held in accordance with the order of Federal District Judge June L. Green dated March 4, 1975." In view thereof, we entered an order of May 9, 1975 remanding the case to the immigration judge for consideration and decision following the administrative action by the Service.

Subsequently, on January 15, 1976, the Regional Commissioner reaffirmed his denials. On July 27, 1976 the District Court granted the Service's motion for summary dismissal of the case. An appeal by the respondents to the U.S. Circuit Court of Appeals is pending.

Counsel for the respondents, the trial at-

torney, and the immigration judge have now joined in a stipulation requesting the Board to consider the appeal from the immigration judge's order in the deportation case, without requiring further action by the immigration judge. In view of the events which have transpired, we shall accede to that request. We shall deny counsel's request for further oral argument. The merits were argued when the case was before us previously.1/

On appeal counsel challenges the immigration judge's assertion that he lacked authority to review the District Director's action in denying the application for extension. Counsel contends that the immigration judge does have the power to review a decision of the District Director to terminate the status of a nonimmigrant alien when the decision by the Disrict Director is "arbitrary, capricious, and unwarranted."

Alternatively, counsel argues that the respondents did not require an extension of

1/ In a supplemental brief, counsel criticizes Matter of Teberan, Interim Decision 2498 (BIA 1976) which he anticipates that we may cite and which was decided subsequent to his oral argument. He desired oral argument in order to present his criticisms orally. We do in fact cite Teberan later; however, our reliance on it is limited to points for which prior authority was already existing, which we cite also. Thus, we do not feel the need to hear further argument in this case.

stay, but are still in the nonimmigrant status in which they were originally admitted. As to this point, he puts forth two theories. First he contends that, when a person in status makes an application to extend or change that status, the status remains valid and in force throughout adjudication of the application, even including appeals to the courts from denials of the application.

The second theory on this point is that the Service by virtue of its promise not to take any action against the respondents until final adjudication of their petitions is estopped from deporting these aliens. Counsel contends that adjudication must be deemed to continue during appeals to the courts from the administrative denials.

The immigration judge was correct that he has no authority to review denials by District Directors of applications for extension. The fact that a District Director's decision may be arbitrary, capricious or unwarranted does not confer authority over the area to the immigration judges.

The question of whether a nonimmigrant's stay should be extended is a matter solely within the discretion of the District Director. Matter of Teberan, Interim Decision 2349 (BIA 1976). Matter of Hosseinpour, Interim Decision 2349 (BIA 1975), Matter of Halabi, Interim Decision 2322 (BIA 1974), Matter of Sourbis, 11 I&N Dec. 335 (BIA 1965). Immigration judges and this Board have no authority to review the District Director's decisions regarding extension of stay. See Matter of Halabi, supra, Matter of Sourbis, supra. Issues as to whether an overstay

was justified are not germane to the questions of the alien's deportability under section 242(a)(2), Matter of Teberan, supra, Matter of Arao, 13 I&N Dec. 156 (BIA 1969).

Counsel cites no authority, and we know of none, in support of his proposition that the status of a person who applies to extend or change his status remains in effect during the adjudication of that application. Even if that were a correct proposition of law, it is questionable that the status would, because of appeals, remain in effect after denial of the requested change. Additionally it is questionable whether such a proposition would apply to a visa petition, which is not actually an application for a change in status, and which does not require the presence of the beneficiary in the United States during adjudication.

Regarding past promises by the Service, it is the position of the Service that it has fulfilled all promises which it made in respect to the respondents. The decision by the Service as to when to commence prosecution of these deportation proceedings is a prosecutorial decision which is not reviewable by the immigration judge or by us and which has no bearing on the immigration status of the respondents. The fact that the Service may, as a matter of policy, decide not to take any action against certain aliens pending their pursuit of collateral remedies does not have the effect of continuing the validity of the prior status. A decision of this type is an exercise of prosecutorial discretion. It has no effect on the prior status of the alien.

Immigration judges and this Board, being adjudicators not prosecutors, have no prosecutorial discretion. Prosecutorial functions do not lie with the Board nor the immigration judges. Once proceedings have been begun, it is not within the province of the immigration judge (nor this Board on appeal) to review the wisdom of the District Director's action in starting the proceedings, but rather to determine whether the deportation charges are sustained by the requisite evidence. Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971), Matter of Lennon, Interim Decision 2304 (BIA 1974).

The remedies being sought by the respondents are not relevant to the question of their deportability. Their presence in the United States is not required for the pursuit of the petitions for H-3 classification. Furthermore, the respondents have now remained in the United States longer than the temporary period for which the H-3 peititons were filed. The petitions were filed to enable the beneficiaries to complete a two year training program. Substantially more than two years have now passed.

The decision of the immigration judge is affirmed.

ORDER: The request for further oral argument is denied.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondents are permitted to depart from the United States voluntarily within 86 days from the date of this order or

any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

Chairman

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Western Region

San Pedro, California 90731

Office of the Regional Commissioner

March 24, 1977

FILE: A20 454 712 - Honolulu

IN RE: Yoko Nikkuni

APPLICATION FOR ADJUSTMENT OF STATUS TO THAT OF A PERMANENT RESIDENT PURSUANT TO SECTION 245 OF THE IMMIGRATION ACT, AS AMENDED

IN BEHALF OF APPLICANT:
David Carliner
Attorney at Law
931 Investment Building
1511 K Street, N.W.
Washington, D.C. 20005

This case is before the Regional Commissioner on certification pursuant to 8 CFR 103.4. The District Director approved the application by concluding the applicant is exempt from labor certification requirements of section 212(a)(14) of the Immigration and Nationality Act.

The applicat is a 32-year-old married female, native and citizen of Japan, who was admitted to the United States on November 30, 1973 as a visitor for pleasure. She was authorized extensions of her temporary stay

to May 29, 1974. After her temporary stay expired she applied for permanent resident status by claiming to be a person who will perform missionary activities for the Unification Church, and indicated the "blanket certification" provision applied in her case.

The District Director, in approving the application, concluded the applicant's relationship with the church, her testimony, and statements submitted with the application indicate she has had sufficient training that qualifies her to engage full-time in furthering the cause of her religion.

To establish the bona fides of the applicant's claim to labor certification exemption, and as mentioned in the District Director's decision, the applicant submitted:

1. A letter from the Unification Church Headquarters in Washington, D.C., requesting on May 8, 1974 that the applicant be given an extension of her temporary stay for six additional months in order to complete a program of study in preparation for missionary assignment abroad.

2. On June 18, 1974, a letter from the Unification Church Headquarters in Washington, D.C., indicating the applicant had been selected to work with members on a team basis, to help coordinate team activities.

3. A letter from the State Director of the Unification Church of Hawaii attesting the applicant has been a member of the

Unification Church since 1965 and has been in missionary training since 1969.

4. A statement of the applicant attesting to her qualifications. She asserts that she speaks English, has knowledge of the "Divine Principle", a strong desire to help others, and to the satisfaction of three elders of the church she has established a strong relationship with God.

Other than the aforementioned, the record does not contain any evidence of ordination, licenses, diplomas or certificates to establish any training or qualifying background.

Schedule A, 29 CFR 60, consists of three categories of employment for which the Secretary of Labor has issued blanket certification under section 212(a)(14) of the Act. Part 60.7, Group III, states:

(a) Any person of any religious denomination whose regular profession or occupation is to conduct religious services, which he is authorized by his denomination to perform, and who is seeking admission to the United States in order to engage principally in such work.

(b) Any person of any religious denomination having a religious commitment, such as a Monk, Nun, Brother, Missionary, and others, who is seeking admission to the United States to perform the duties required of him by virtue of such commitment.

(c) Any other person seeking admission to the United States to perform duties related to the nonprofit operation of a religious organization (1) if the duties which he will perform involve special skills, training and experience which the alien possesses and which are related to the religious objectives of the organization and (2) if he intends to be engaged principally (more than 50% of his working time) in such duties. Examples of persons coming within this subgroup are cantors and translators of religious tracts or texts who have the special capability of conveying through the translation the spiritual message to which such tracts or texts are directed and who will be engaged in such endeavors.

An operation may be considered nonprofit for purposes of Group III if the receipts from the operation will be used exclusively in furtherance of philanthropic or religious purposes of the organization.

The District Director judged the applicant is qualified under paragraph (c) of the regulation and implied in his decision that she is qualified also under paragraph (b) of the regulation as a missionary. Therefore, we shall consider both paragraphs in our decision.

Paragraph (b) of the regulation has grouped the term "missionary" with "Monk", "Nun" and "Brother," and by so doing it will be considered that all such persons within the group possess similar ecclesiastical levels of

responsibilities and duties. In Christianity, this group of people, as defined, have withdrawn from the world for religious reasons and live according to a particular rule under vows of poverty, chastity and obedience, devoting their lives to the church. Black's Law Dictionary defines "missionary", in church parlance, as a commited person who teaches the principles of Christianity, cares for the afflicted and supplies the needy. Missionaries are teachers who are sent to heathen countries to Christianize, civilize and educate the natives (Appeal of Domestic and Foreign Missionary Society, 30 Pa. 425, 435). It is the spreading of religious doctrines among nonbelievers.

In order to qualify under paragraph (b) of the regulation, we hold that an applicant must meet its definition. On the basis of evidence submitted the applicant has established that she is a devoted and well-versed member of her church, but falls short of the requisites needed to qualify as a missionary for the purposes of 29 CFR 60.7, Group III(b).

The applicant has stated that she has studied for a number of years to gain knowledge of the "Divine Principle," which is the Unification Church's book of interpretation of the Bible, and the doctrine of the movement. In researching reliable published documents in order to gain insight into the Unification Church, we have learned that this organization is part of the "Holy Sprit Association for the Unification of World Christianity." Each convert or disciple is infused with the "Divine Principle" and is taught its basic

beliefs, as was the applicant. This movement is basically Christian and is similar to other Protestant groups who in the past were started in an attempt to unite all Christians. This is denoted even within the name of this church. The work to be done by the applicant is the same required for all members of this denomination, and is not basically different than what is expected and taught by other Protestant faiths. In studying this definition, it is realized that a missionary for any Christian denomination in the United States can only be considered simply as "proselytism," since new church members basically come from other Christian sects within the United States and not from nonbelievers. Christianity is the dominant religion in the United States. In performing duties generally defined for a missionary, the applicant would have to be a person that labors to spread the Gospel, especially among a neglected population (In re McCormick, 206 N.Y. 99 N.E. 177). We cannot conscientiously consider the United States as a neglected population, religiously speaking.

Title 29 CFR 60.2(a)(1) states that blanket labor certification can be issued for the category in question only if there are not sufficient workers who are able, willing, qualified and available for the position. This religious cult claims to have well over 30,000 followers in the United States, all of whom have knowledge of the "Divine Principle." The same can be said of Protestants who have knowledge of the Bible. It is a matter of record that Unification Church missionaries openly proselytize in public places. They also use a lecture, a study club, a rap

session or even an offer of employment as an opening wedge for potential converts. Every member is expected to work at producing converts and money for the sect. It is concluded that all members of the Unification Church can perform the same duties as the applicant. Consequently we hold the applicant is not a missionary within the defines discussed above and, therefore, does not qualify for exemption of labor certification under Schedule A, 29 CFR 60.7, Group III(b).

Paragraph (c) of the regulation remains to be resolved. This paragraph, as previously stated, concerns itself basically with the duties to be performed by the applicant, which involve special skills, training and experience.

In the Matter of Blaich, Int. Dec. No. 2364, it was held that to meet the criteria for "blanket certification," it must be established that the duties to be performed involve special skills, training and experience which are related to the religious objectives of the organization; that the alien possess these skills, training and experience; and that these duties will require more than half of the applicant's working time.

Again we go to the record in search of evidence to establish the applicant's commitment, religious and secular duties that would qualify her for the status she seeks. In the Matter of Blaich, supra, the applicant was eminently qualified as a religious worker which he established through his years of study in religious universities and a teacher's college as well as a conventional university. His application was approved because the record in his case overwhelmingly indicated an outstanding

background of formal training, as well as his moral and religious qualifications.

In the instant case, the applicant does not have such an eminent background. To the contrary, evidence submitted with the application consists only of letters that claim she has been a member of the Unification Church since 1965 and had been selected to work with members of the congregation on a team basis because she has knowledge of the "Divine Principle" as well as a desire to help people. To consider the applicant as a qualified religious worker for the purpose of "blanket labor certification" would mean that any knowledgeable active member of any congregation may be considered likewise. We hold that an applicant to qualify for "blanket certification" as a religious worker must be more than just a devoted member of the church who diligently follows and practices its religious teachings, as indicated in this case. A religious worker for immigration purposes is considered here as a professional who is distinguished or unique among the other religious workers of the church and possesses a background similar to that in the Matter of Blaich, supra. The applicant in this case does not meet that criteria. She does not have the educational background, licenses, diplomas or certification of training to place her in a category reserved for religious workers, such as cantors or translators of religious tracts or texts as stated in paragraph (c) of the regulation. This regulation never was intended to provide "blanket certification" for all religious people who are knowledgeable and actively participating in its church program, unless they have a similar background as stated in the Matter of Blaich, supra.

The entire record in this case has been carefully reviewed and considered. We have noticed, incidentally, that the applicant, in coming to the United States entered for the purpose of completing a program of missionary work and study. On May 23, 1974, she applied for an additional extension of her temporary stay as a visitor for that purpose. However, the application was denied on the basis that she had failed to establish that the purpose for which she was admitted as a nonimmigrant had not been accomplished. Aliens who seek to enter the United States to perform religious duties, as in this case, are considered to be coming to perform skilled or unskilled labor, and therefore, must obtain labor certification. Even though the regulation states that "blanket certification" as been issued, no provision is made for those training for an occupation within one of the three categories of Schedule A, 29 CFR 60.7, Group III (a), (b) or (c).

On the basis of the record, it is concluded that pursuant to 8 CFR 204.2(e)(4) the applicant cannot be considered as having obtained a certification under section 212(a)(14) of the Act, inasmuch as it has heretofore been determined she is not qualified for religious worker classification. The review of the record fails to establish any indication the applicant is entitled to any other immigrant classification or is otherwise exempt the presentation of labor certification.

The applicant has not submitted a labor certification and is subject to the requirement. Therefore, she is ineligible under 8 CFR 245.1 (e) for adjustment of status as a nonpreference immigrant. In addition, by failing to comply

with the labor certification requirement she has not acquired a priority date for allocation of immigrant visa, and accordingly, has not established that an immigrant visa is immediately available as required under section 245 of the Act. The District Director's decision will be reversed and the application denied.

ORDER: IT IS ORDERED that the District Director's approval decision be reversed and the application denied.

/S/ Ed O'Connor

REGIONAL COMMISSIONER
WESTERN REGION

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York, New York 10007

Refer to this File No.

NYC-N 51672 (NIU)

Date: Nov. 30, 1976

Holy Spirit Association for the
Unification of World Christianity
4 West 43rd Street
New York, New York 10036

Att: Neil Albert Stoney

DECISION

Upon consideration, it is ordered that your Petition to Classify Nonimmigrant as Temporary Worker or Trainee be denied for the following reasons:

The petition filed on behalf of the Holy Spirit Association for the Unification of World Christianity of 4 West 43rd Street, New York, New York is to classify 170 Beneficiaries as H-3 trainees. The Petition states that the petitioner is an evangelical church, with no formal employees, but with 7,000 full time members. The gross annual income for 1975 was $8,620,342.00 which included donations from the Unification Church of New York but does not indicate all field income. The present occupation of the 170 beneficiaries is listed as "Missionary". During the proposed 5 months

of training they are to receive no salary but will receive room-board and personal expenses valued at $30 to $35 weekly.

The purpose of the training as stated is to develop missionaries, lay teachers, and group leaders for the "Holy Spirit Association for the Unification of World Christianity" to serve in their respective countries following advanced educational programs, practicums and field experience in the United States". As stated in the petition, "The training will include both classroom instruction, practicums within the training institution, on-the-field experience with close supervision, review and critique of United States field experience, advanced educational study, and formal training and orientation for International One World Crusade Team, with specific ecumenical application of experience and indoctrination acquired in training program in the United States." The petition also gives a breakdown of the time to be spent in the various phases of the training, which include lectures in theology, philosophy, human history, communications, public speaking, field experience and on the job training.

Section 101 (a)(15)(H)(iii) of the Immigration and Nationality Act defines an H-3 Trainee as an "alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee". Part 214.2(h)(4)(i) of Title 8 of the Code of Federal Regulations states, "In addition to purely industrial establishments, an individual, organization, firm, or other trainer may petition for nonimmigrant trainees on form I-129B for the purpose of giving instruction or

training in agriculture, commerce, finance, government, transportation and the professions."

The occupation of the beneficiaries is listed as "Missionary". Volume 1 Definition of Titles, third edition 1965 Page 135, published by the Department of Labor defines missionary as one who "carries religious message to lands and peoples not of own faith to win converts and establish native church. Provides educational, nursing and other services". While the program outlined in the petition may provide some training related to missionary work in terms of carrying the religious message of the "Holy Spirit Association for the Unification of World Christianity" and training in areas of proselytizing and winning converts to that organization, while not providing training in education, medical, nursing or other service aspects commonly associated with the work of a "missionary" is indicative that the mission of the beneficiaries will be to win converts only, without providing any apparent benefits to those they wish to convert.

The summary of the training program states, "No trainee will engage in any productive employment in the sense of creating, manufacturing, selling or distributing any marketable products or performing marketable services for consumers or other users". While this statement carefully omits aspects of fund raising activities through solicitation from door to door, on street corners and in public places, it does not, on the other hand, state that it will not be part of the program. Since this has been an important part of the previous activities of other young people

connected with the "Holy Spirit Association for the Unification of World Christianity," it is not unreasonable to expect this activity to continue. It is a matter of record that the attorney for the petitioner, in oral argument on previous petitions for H-3 trainees by the same petitioner, admitted that the beneficiaries had participated in fund raising activities but contended they could not be considered productive employment. This contention does not consider that the use of time by the beneficiaries to produce monetary benefits for the petitioner can be defined as productive employment in the same manner that a professional fund raiser is being productive when he produces monetary gains for his employer.

When section 101(a)(15)(H)(iii) of the Immigration and Nationality Act covering the H-3 Industrial Trainee was added to the Act, it was designed to accomplish the training of alien nonimmigrants in order that they could utilize the benefits of that training in a foreign country. The intent here was for the utilization of this training for the benefit of the trainee and the country of which he was a national. When the Act was revised on April 7, 1970 to broaden the training to encompass training in agriculture, commerce, finance, government, transportation and the professions the original intent for the utilization of such training was not changed. The training program as outlined in the instant petition does not conform to this original and current intent of the H-3 trainee in that there are no benefits to be derived from this training except those benefits that would be derived by the "Holy Spirit Association for the Unification of World Christianity".

When the Immigration and Nationality Act was amended by the 91st Congress in 1970, the amendment deleted the word "Industrial" where it appeared in section 101(a)(15)(H)(iii) of the Act so that the clause would not be limited to an "Industrial" trainee but would broaden the H-3 trainee designation to permit the admission of a trainee in agriculture, commerce, finance, government, transportation and the professions. Since the beneficiaries in the instant petition do not fall within the categories of agriculture, commerce, finance, government or transportation we must assume that the proposed training would prepare them in a "Profession".

In the Matter of Shin (11 I & N Dec. 686) it was found that "since Profession as defined by section 101(a)(32) of the Immigration and Nationality Act as amended by P.L. 89-236 contemplates knowledge or learning - not merely skill of - an advanced type in given field gained by a prolonged course of specialized instruction and study of at least a baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor".

In the instant petition no evidence has been submitted to show that the beneficiaries have attained knowledge or learning - not merely skill - of an advanced type in the "missionary" field or related religious studies gained by prolonged course of specialized instruction and study of at least a baccalaureate level, which is the realistic prerequisite to entry as an H-3 trainee into the missionary field of endeavor.

You have failed to establish that the benefic-

iaries will not be engaged in productive employment. You have failed to establish that the beneficiaries will not be engaged in productive employment. You have failed to establish that the proposed training will be of benefit to anyone except the "Holy Spirit Association for the Unification of World Christianity". You have failed to establish that the beneficiaries are bona fide H-3 trainees as defined in 101(a)(15)(H)(iii) of the Immigration and Nationality Act and part 214.2(h)(4)(i) of Title 8 of the Code of Federal Regulations.

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A20 351 136 February 25, 1977

In the Matter of	)	
	)	
GERHART WIESINGER	)	IN DEPORTATION
	)	
Respondent	)	PROCEEDINGS

CHARGE: I&N ACT, 1952; Section 241(a)(2), remained longer

LODGES: None

APPLICATION: Adjustment of Status, Section 245, nonpreference

Voluntary Departure

IN BEHALF OF RESPONDENT:	IN BEHALF OF SERVICE:
David Carliner	Arnie R. Brassart
Suite 931	Trial Attorney
1511 K Street, N.W.	Denver, Colorado
Washington, D.C. 20005	

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 24 year old single male alien, a native and citizen of Austria who entered the United States on or about January 22, 1973 at New York, New York, as a visitor for pleasure authorized to stay in the United States until February 6, 1976.

The present proceedings were initiated by the Service under the provisions of Section 242 of the Immigration and Nationality Act (8 USC 1252) by the issuance of an Order to Show Cause dated April 16, 1976 alleging the above facts.

It further alleges that he has remained in the United States beyond February 6, 1976 without authority of the Service and charges deportability under Section 241(a)(2) as one who, after admission as a nonimmigrant, has remained in the United States for a longer time than permitted.

At a deportation hearing held before me April 27, 1976, respondent through counsel, admitted the allegations and charge in the Order to Show Cause conceding deportability. The Order to Show Cause was then entered into evidence as Exhibit No. 1.

Respondent was advised that he was eligible to apply for administrative relief of voluntary departure and adjustment of status under Section 245 if a visa petition or labor certification had been approved in his behalf. Respondent submitted his application for status as permanent resident, Form I-485, and supporting documents to apply for adjustment of status to permanent resident under the provisions of Section 245 of said Act (8 USC 1255). He claims that a nonpreference visa is available to him because as a missionary he qualifies for a labor certificate under the precertification provisions of Schedule A, Group III(b) of 29 CFR 60.7. His application, with supporting documents was received into evidence without objection as Group Exhibit No. 2.

In Group Exhibit No. 2, Item 21, Form I-485, respondent states he will seek gainful employment in the United States as a missionary. Form MA 7-50A, Statement of Qualification of Alien, a supporting document within Group Exhibit No. 2, at Item 18 therein shows that

respondent is employed by the Unification Church of America as a missionary listing his duties as follows:

> "Nightly presentation of the Divine Principle, helps to conduct church activities, including weekly workshops, Sunday School and witnessing activities, counsels members in regards to religious and personal problems. Help to direct and coordinate youth activities. Organizes and conducts weekly prayer meetings and worship services, counsel prospective members in preparation for church membership. Witness to attract others to the church, attends training classes to learn to teach the Divine Principle, attends leadership training courses, and attends Bible study classes."

Also included as a supporting document in Group Exhibit No. 2 is a letter addressed to respondent on letterhead of The Unification Church dated June 18, 1974, extending congratulations on his selection to serve in the mission field.

Exhibit No. 3 is a letter from the Unification Church, United States Headquarters in New York dated March 17, 1976 addressed to the Service Office in Denver, Colorado. In the first paragraph it is stated that the church authorities deem him qualified as a missionary of the Unification Church. Succeeding paragraphs of this letter detail his development within the church and their judgment of his capabilities. The last paragraph states that he was appointed State

Director of the Unification Church of Colorado in October 1975, and has maintained that position since.

Group Exhibit No. 4 is Notice of Decision Denying Application for Status as Permanent Resident, Form I-291. No weight is given this exhibit as 8 CFR 242.17 allows such relief as sought.

Exhibit No. 5 shows that the Holy Spirit Association for the Unification of World Christianity is incorporated under the General Nonprofit Corporation law of the State of California.

Exhibit No. 6 is a book titled Divine Principles, which respondent has testified contains the revelations and teachings of Reverend Moon and contains basic doctrines of the Unification Church.

Exhibit No. 7 is a book titled Unification Thought. Respondent has testified that this book and Divine Principles form the basic published doctrines and teachings of Rev. Moon and along with the Holy Bible, form the basic literature of the Unification Church.

Exhibit No. 8 is a certification that respondent has successfully completed the Missionary Training Program of the Unification Church of America at Belvedere International Training Center, Tarrytown, New York dated October 10, 1974.

Exhibit No. 9 is a schedule of the Missionary Training Program of the Unification Church covering sixteen weeks at Barrytown, New York which respondent testified he completed.

Section 245 of the Act provides:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

The evidence establishes that respondent was inspected and admitted into the United States and has made his application for such an adjustment (Group Exhibit No. 2), and is eligible to receive an immigrant visa and is admissible to the United States for permanent residence provided an immigrant visa is immediately available to him at the time his application is approved. The February 1977 Bulletin issued by the Department of State indicates that a nonpreference immigrant visa is available to eligible immigrants.

Respondent claims he is eligible to receive a nonpreference immigrant visa because he is seeking admission into the United States as a missionary (Section 303(a)(8) 8 USC 1153(a)(8); and because, he is seeking admission into the United States as a missionary, he has an alien labor certificate issued to him by the Secretary of Labor discharging his duty under the

provisions of Section 212(a)(14)(8 USC 1182(a)(14) of said Act who precertified by regulation aliens in respondent's category.

Schedule A, Group III(b) states:

> "Any person of any religious denomination having a religious commitment, such as a Monk, Nun, Brother, Missionary, and others, who is seeking admission into the United States to perform the duties required of him by virtue of such commitment."

Such precertification was recognized by the Board in the unreported case Knut H. Friess, A20 372 482, Buffalo, (BIA-1976) in which the Board states:

> "Aliens who seek to enter the United States to perform religious duties are considered to be coming to perform skilled or unskilled labor and therefore must obtain a labor certification, although they are precertified by regulation. 29 C.E.R.60.2(a)(1) and 60.7, Schedule A, Group III(a), (b),and (c).

The evidence of record establishes that respondent is a person belonging to a religious denomination (Exhibits 2, 3, 5, 6, and 7). Religion is defined in the American Heritage Dictionary of the English Language, New College Edition, 1969, as follows:

> "religion. 1. The expression of man's belief in and reverance for a superhuman power recognized as the creator and governor of the universe. 2. Any particular

> integrated system of this expression: the Hindu religion. 3. The spiritual or emotional attitude of one who recognizes the existence of a superhuman power or powers. 4. Any objective attended to or pursued with zeal or conscientious devotion: A collector might make a religion of his hobby. 5. Obsolete. Sacred rites or practices. (Middle English religion, from Old French religion, from Latin religion, bond between man and the gods, perhaps from religare, to bind back: re- back + Ligare, to bind, fasten.)

The evidence of record establishes that he has a religious commitment (Exhibits 2, 3, 8 and 9) and his testimony describing his work and a typical day's activities beginning at 6:30 a.m. with prayer services continuing through the day with lectures, to give street preaching, counseling, and ending around 10:30 p.m. with prayer services and singing. Based on personal observation, respondent has convinced me that he is deeply and sincerely committed to serve his denomination.

The word missionary is defined in the above mentioned dictionary as follows:

> missionary. 1. One who is sent on a mission; especially a person sent to do religious or charitable work in some territory or foreign country. 2. A propagandist - - - adj. 1. Of or pertaining to missions or missionaries. 2. Engaged in the activities of a mission or missionary. 3. Tending to propagandize or use insistent persuasion: missionary fervor.

However, Exhibit No. 3, dated Marcy 17, 1976, submitted to the Service by his employer establishes that respondent is employed as a State Director of the Unification Church of Colorado since October, 1975. A director is defined in the mentioned dictionary as follows:

> director. 1. One who supervises, controls, or managers. 2. A member of a board of persons who control or govern the affairs of an institution or corporation. 3a. One whose profession is the supervision and instruction of the actors in a dramatic production. b. The conductor of an orchestra or chorus.

The evidence establishes that respondent is empoyed as a State Director in a managerial capacity rather than as a missionary. The text and examples cited in Schedule A, Part III(b), 29 CFR 60.7, tract with a class of aliens whose commitment appears to be devoted in an area of service. Such text and examples do not tract with a supervisor, manager, or director.

Under the provisions of Section 291 of said Act (8 USC 1361) the burden of proof is placed upon the respondent to establish that he is not subject to exclusion under any provision of the Act. The provisions of Section 212(a)(14)of said Act excludes aliens from admission into the United States unless the Secretary of Labor has issued a labor certificate in the discharge of his duties. Consequently, as respondent has failed to establish that he has such alien labor certification under provisions of Schedule A, Part III(b),

29 CFR 60.7, I find that respondent is excludable under the provisions of Section 212(a)(14) of said Act and his application for status as a permanent resident must be denied.

Respondent conceded deportability and as there remain no other issues of fact or law, I find that deportability has been established by clear, convincing and unequivocal evidence.

Respondent is eligible for voluntary departure in lieu of deportation and such relief will be granted. He has chosen to be sent to Austria if ordered deported from the United States. Accordingly, the following orders are entered.

ORDER: That the respondent's application for adjustment of status to that of a lawful permanent resident is denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation, respondent be granted voluntary departure without expense to the Government on or before April 23, 1977 or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Austria on the charge(s) containe in the Order to Show Cause.

/s/ JESSE M. SELLERS

February 25, 1977

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
333 Mt. Elliott Street
Detroit, Michigan 48207

Satoe Nake
19450 Exeter
Detroit, MI 48203

Refer to this File No.:
A20 659 824

Date: Mar 21, 1978

Telephone: (313) 226-3267

DECISION ON APPLICATION FOR STATUS
AS PERMANENT RESIDENT

Upon consideration, it is ordered that your application for status as a permanent resident be denied for the following reasons:

Your application for adjustment of status to lawful permanent resident has been given careful consideration. The application is based upon a claimed exemption from labor certification as a missionary. Title 29, United States Code of Federal Regulations Section 60.7 does provide a blanket labor certification under Group III to those persons having a religious commitment as a missionary.

We are unable to conclude based upon evidence thus far presented and the ambiguous description of job duties set forth on the MA 7-50A forms submitted with the application, that the actual activities in which you would be engaged are in any way differentiated from the normal range of activities associated with the rank and file membership of the Unification

Church. Your description of the responsibilities and duties of a missionary with the Unification Church is vague and indeed might be associated with any person who is active with and supportive of his church.

Therefore, since you have not distinguished yourself in any way from the rank and file membership of the church, you do not fall within the ambit of 29 C.F.R. 60.7 and your application is denied since it is not supported by a valid labor certification.

You are granted to March 31, 1978 to effect your departure from the United States voluntarily, without the institution of proceedings to enforce your departure. You must notify this office before that date on the enclosed card (Form I-438) of the arrangements you have made to depart from the United States. <u>At the time of your departure from the United States, do not fail to surrender Form I-94, Arrival-Departure Record, in accordance with the instructions on that form</u>.

If you fail to depart from the United States by the date specified, proceedings will be instituted to enforce your departure. You may renew your application for status as a permanent resident during such proceedings.

CERTIFIED
cc: David Carliner, Attorney
Suite 931 Investment Bldg.
1511 K St., N.W.
Washington, D.C. 20005

Sincerely yours,

/S/ Lawrence Paretto
Acting District Director

Enclosure I-438

Supreme Court, U. S.
FILED
AUG 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-1695

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNIFICATION CHURCH, ET AL., PETITIONERS

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

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Miscellaneous:

Gordon & Rosenfield, *Immigration Law & Procedures* (rev. ed. 77) — 14
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported. The two opinions of the district court (Pet. App. 19a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1978. The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial of visa petitions seeking to classify a group of aliens as missionary trainees, on the ground that the church sponsoring them was not conducting a *bona fide* training program, contravened the Free Exercise Clause of the First Amendment.

2. Whether the Regional Commissioner's denial of the petitions was in fact grounded on a determination that the church was not conducting a *bona fide* training program.

3. Whether the Regional Commissioner's reliance on the aliens' fund-raising activities as evidence that the church was not conducting a *bona fide* training program was improper.

4. Whether the church was prejudiced by the Regional Commissioner's failure to remand the case to the District Director.

5. Whether petitioner Asai was deprived of due process because she was not permitted to challenge the District Director's denial of her application for an extension of her stay in the United States during her deportation hearing, though she could do so in district court.

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The pertinent portions of the First Amendment to the United States Constitution and of 8 C.F.R. 214.2 (h)(4) are reprinted at Pet. v. and viii.

STATEMENT

A. The Unification Church Case

Petitioner Unification Church (the Church) is an international interfaith religious movement (Pet. App. 2a). In 1972 the Church instituted a program to bring some of its foreign members to the United States as "missionary trainees" (see Pet. 1-2; Pet. App. 20a). Under the program, approximately 600 aliens have been admitted to this country (Pet. 2). Beginning in January 1974, the Church sought to clarify the immigration status of its trainees and to enable them to remain in this country for a longer period than that for which they had been admitted (Pet. App. 28a, 2b). To this end the Church filed four visa petitions with the Immigration and Naturalization Service (INS) pursuant to 8 U.S.C. 1184 (c), seeking to classify a total of 583 aliens as missionary trainees pursuant to 8 U.S.C. 1101 (a)(15) (h)(iii).[1] These petitions are known as "H-3" petitions.

---

[1] 8 U.S.C. 1101(a)(15) provides in pertinent part:

> The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

The Church's H-3 petitions were denied by the New York District Director of the INS (J.A. 76, 125-130).[2] His decisions were affirmed by the Northeast Regional Commissioner,[3] who stated (Pet. App. 79a):

> The record further reveals that many of the beneficiaries—as well as other aliens not currently covered by an approved or pending H-3 petition—were located in various towns and cities throughout the United States engaged in the sale

---

(H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (iii) who is coming temporarily to the United States as a trainee * * *.

Before an alien can achieve "H-3" status, his employer must file an acceptable petition with the Attorney General. 8 U.S.C. 1184(c) states:

> The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

[2] "J.A." refers to the joint appendix filed with the court of appeals.

[3] The Regional Commissioner affirmed the District Director's denial of the first of these petitions on May 20, 1974 (Pet. App. 73a-94a). The Regional Commissioner affirmed the denial of the remaining three petitions on May 23, 1974 (Pet. App. 45a-72a).

> of such merchandise as tea, flowers, candles, peanuts and candy in shopping centers, on the streets, and on a door-to-door basis, and soliciting donations on behalf of the Unification Church. In a number of instances, arrests by police authorities resulted because the solicitation of funds was in violation of local ordinances. Some of these aliens had been in this country less than a few weeks' time, one such individual having been admitted about one week earlier. Many of the aliens encountered by Service officers were found to be in the United States unlawfully by reason of having remained here beyond their authorized period of stay.

The Commissioner concluded (Pet. App. 93a):

> Despite the assertion that such solicitations are only a small part of the overall field experience, information received from various Service officers throughout the United States substantiates that the beneficiaries have been widely and repeatedly engaged in such pursuit. We are led to the inescapable conclusion that the petitioner's current training program, which calls for three times as much field work as formal study, has been designed primarily for fund raising rather than for training purposes.

The Church sought review in the United States District Court for the District of Columbia under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, arguing that these passages revealed that the Commissioner had violated INS regulations prohibiting decision-making on the basis of adverse informa-

tion not made available to the affected party. See 8 C.F.R. 103.2(b)(2), 214.2(h)(6).[4] The district court, finding that the Regional Commissioner had relied on evidence that the Church had not been given an opportunity to rebut, held that the case must be remanded "to the Regional Commissioner and reopened to provide the plaintiff the opportunity to inspect and rebut the adverse information" (Pet. App. 31a-32a).

On remand, the Regional Commissioner made available to the Church all adverse information in his files, and the Church submitted a memorandum in response to this information (Pet. App. 5a). The Commissioner then reaffirmed his earlier decision (Pet. App. 34a-44a), and his ruling was in turn affirmed by the district court, which granted summary judgment for the Attorney General (Pet. App. 19a-26a). The court of appeals affirmed (Pet. App. 1a-9a, 18a).

B. The Keiko Asai Case

After the denial of the H-3 petitions by the New York District Director and the initial affirmance of the denial by the Northeast Regional Commissioner, petitioner Keiko Asai, one of the Unification Church's

[4] 8 C.F.R. 103.2(b)(2) states that if an application presented to the INS may be denied on the basis of derogatory evidence of which the applicant is unaware, the applicant should be "advised thereof and offered an opportunity to rebut it and present evidence in his behalf before the decision is rendered * * *." In connection with the adjudication of petitions for alien trainees, 8 C.F.R. 214.2(h)(6) provides that, "If an adverse decision is proposed on the basis of any evidence not submitted by the petitioner, he shall be so notified before a final decision is made and invited to inspect and rebut such evidence."

"missionary trainees," applied for an extension of her stay in the United States (Pet. App. 10a). On September 5, 1974, the District Director denied her application, without a hearing, stating as his reason that she had " 'failed to establish that the purpose for which [she was] admitted has not been accomplished and that [her] requested extension is not merely an attempt to prolong [her] stay indefinitely' " (*ibid.*). Asai was instructed "to depart from the United States not later than September 20, 1974" (*ibid.*).

When Asai failed to depart from the United States as instructed, she was served with an order to show cause why she should not be deported (*ibid.*). At her deportation hearing, the immigration judge ruled that her deportability had " 'been established by clear, convincing, and unequivocal evidence' " (*ibid.*). Relying on *Matter of Sourbis*, 11 I & N Dec. 335 (B.I.A.), the immigration judge held that it was unnecessary to consider whether the purpose for which Asai had been admitted to the United States had been accomplished or whether she was merely attempting to prolong her stay indefinitely, because he had no jurisdiction " 'to make any determination as to the propriety of the District Director's decision' " denying her application for an extension of her stay (Pet. App. 11a). Asai and 41 similarly situated members of the Church filed an administrative appeal, and the Board of Immigration Appeals affirmed the decision of the immigration judge (Pet. App. 1b-8b).

Asai and 14 other members of the Church[5] then

[5] The other petitioners were Franz Haimdienst, Yoshibiro Ichijo, Sumiko Ishii, Machiko Kobayashi, Yoko Kobayashi,

sought review in the Court of Appeals for the District of Columbia Circuit. The parties stipulated that the issues on appeal were identical with respect to each of the 15 petitioners, that Asai's case was representative, and that the administrative record in her case contained all the necessary materials for decision of the issues raised by all the petitioners (see Pet. App. 10a and n. 9). The court of appeals consolidated the case with the Church's appeal, and it affirmed the Board's decision upholding the orders of deportation (Pet. App. 10a-18a).

ARGUMENT

1. The Church contends (Pet. 16-18, 23-29) that the denial of its H-3 visa petitions involved an intrusion into its religious training program that infringed its rights under the Free Exercise Clause of the First Amendment. The contention is without merit.

As the court of appeals held (Pet. App. 9a), the Northeast Regional Commissioner made a facially legitimate threshold determination that the training program was not *bona fide*, and the Church's challenge to the denial of its H-3 visa petitions is therefore foreclosed by this Court's decision in *Kleindienst*

Takahumi Morikawa, Hironi Onishi, Kuniko Onishi, Michiyo Ota, Fumiko Ozeki, Emiko Seki, Miyoko Tanaka, Kuniko Watanabe, and Noriyoshi Saito. Since it appears that these petitioners in the court of appeals join Asai in the instant petition, references to Asai in the argument portion of this brief refer to these other petitioners as well.

v. *Mandel*, 408 U.S. 753, 769-770. In *Mandel*, the Attorney General denied the application for a temporary non-immigrant visa submitted by a Belgian Marxist on the ground that during previous trips to the United States he had failed to conform to his itinerary and to limit his activities to his previously stated purposes. Several university professors who were United States citizens brought an action to compel the Attorney General to grant the visa to Mandel, claiming that his refusal to do so abridged their First Amendment rights to participate in academic conferences and exchanges with Mandel in the United States. This Court held, however, that when the Executive exercises its power to refuse to admit aliens on the basis of a facially legitimate and *bona fide* reason, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770.

The same analysis applies here. The Attorney General is authorized to admit nonimmigrant aliens as trainees pursuant to 8 U.S.C. 1101(a)(15) and 1184 (c). The denial of the H-3 visa petitions in this case was based on the facially legitimate determination that the Church had not established a *bona fide* training program. There is no warrant for the courts to look behind this exercise of discretion. See also *Fiallo* v. *Bell*, 430 U.S. 787, 792.

2. Petitioners contend (Pet. 15-24), however, that the court of appeals failed to judge the Regional Com-

missioner's decision on the grounds that the record discloses the Commissioner himself relied on, as required by *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80. Citing several portions of the Commissioner's decision, petitioners urge (Pet. 19-21) that the record contains no finding by the Commissioner that the Church was using its so-called trainees as fund raisers, rather than training them.

This contention is not supported by the record. In his first decision, the Regional Commissioner held (Pet. App. 93a): "[w]e are led to the inescapable conclusion that the petitioner's current training program, which calls for three times as much field work as formal study, has been designed primarily for fund raising rather than for training purposes." After the reopening of the record to permit petitioner to review and rebut adverse information, the Commissioner reached the same conclusion (Pet. App. 37a): "that the field activities of the Petitioner, which comprise two thirds of the training time, are to solicit monies rather than provide substantial training." Accordingly, the Regional Commissioner held (Pet. App. 42a-43a) that "[t]he petitions in question were denied because the Petitioner failed to satisfactorily establish a bona fide training program within the interpretation of law," and he affirmed that denial.[6]

---

[6] As the court of appeals correctly recognized (Pet. 8-9), the Regional Commissioner's other comments regarding the administration, development, utility, and need for the training program (see Pet. ii) are irrelevant, since the Commissioner's threshold finding is a sufficient basis for denial of the petitions.

In support of its contention that the denial of its H-3 petitions in this case was motivated by prejudice against it, the Church cites (Pet. 22-24; Pet. Apps. C-F) a number of administrative decisions in other cases that are not before this Court. Although we do not agree with petitioners' contention (Pet. 23 n. 10) that those decisions indicate a "purpose on the part of INS to deny all applications and petitions filed by members of the Unification Church, regardless of merit," we do not consider it necessary or appropriate to analyze those decisions here.

3. The Church next urges (Pet. 24-29) that the Regional Commissioner erred in relying on the predominance of fund raising as a basis for concluding that the Church was not operating a *bona fide* training program.

a. Petitioner relies primarily (Pet. 24-27) on this Court's decision in *Murdock* v. *Pennsylvania*, 319 U.S. 105, holding that missionary evangelism activities, including the sale of Bibles or religious articles to defray expenses, are protected by the First Amendment. Petitioner claims that therefore the Regional Commissioner could not properly deny the Church's H-3 petitions on the basis of his finding that the missionary trainees were primarily engaged in similar fund-raising activities (Pet. 24-27).

No such conclusion follows from *Murdock*. The Regional Commissioner did not suggest that the Church's fund-raising activities were improper or were not protected by the First Amendment—just as this Court made no such suggestion about the academic activities in *Mandel*, *supra*. The question before the

Regional Commissioner was a narrow one: whether the Church was conducting a training program within the purview of Section 101(a)(15) of the Immigration and Nationality Act, 66 Stat. 167, as amended, 8 U.S.C. 1101(a)(15). The Regional Commissioner determined only that a program in which the majority of the alien's time was devoted to fund raising, not to training, did not qualify as a *bona fide* training program.

Petitioners do not challenge the authority of Congress to provide for the extended admission of alien trainees without making the same provision for fund raisers, religious or otherwise. The provision Congress has made for alien trainees required the Regional Commissioner to determine whether the aliens in this case would be taking part in a training program, or whether they would be engaged primarily in fund raising. That is the determination he made.

b. The Church also contends (Pet. 22, 27-28) that the Commissioner's reliance on the trainees' fund raising activities contravened 8 C.F.R. 214.2(h)(4)(ii), which provides that "[t]he source of any remuneration received by a trainee and whether or not any benefit will accrue to the petitioner are not material * * *." This argument is insubstantial. The Regional Commissioner was not concerned either with the source of the trainees' remuneration or with whether the Church would benefit from the activities of the trainees—but with whether the Church had established a *bona fide* training program, as distinguished from a program aimed primarily at raising

funds. The regulation does not, and could not, alter the statutory limitation that H-3 permits may be granted only to enable aliens to attend training programs.

4. Finally, the Church argues (Pet. 29-32) that the Regional Commissioner erred in failing to remand the case to the District Director. The Church contends (Pet. 30) that on remand from the district court it was entitled to *de novo* review before the District Director, who would have been required, under 8 C.F.R. 214.2(h)(6), to set forth the facts he deemed pertinent and the specific reasons for his conclusions. The Church urges that review before the Regional Commissioner was not an adequate substitute.

However, as the court of appeals found, the Church was not prejudiced by the lack of a remand to the District Director (Pet. App. 6a-7a). Although the Commissioner invited the Church to introduce new evidence, the Church "neither proffered nor introduced any" (*ibid.*). Since the case was originally heard by the District Director and since the Church chose not to introduce any new evidence when the case was reopened, the Church could not suffer prejudice from the fact that it was not afforded a second review by the District Director on the same evidence.

In any event, the court below also correctly held (Pet. App. 7a) that "the commissioner independently concluded that [the Church] had not met 'the burden imposed upon [it] by regulation,'" and that "[t]his conclusion is not beyond the Commissioner's authority

under INS regulations." INS Regional Commissioners can and do make *de novo* findings of fact, just as the Board of Immigration Appeals does. See 8 C.F.R. 103.1(m)(11), 103(3); cf. *Matter of B—*, 7 I & N Dec. 1 (A.G.); 1 Gordon and Rosenfield, *Immigration Law and Procedure* § 1.10e, pp. 1-57 to 1-60 (rev. ed. 1977). The powers exercised by the Regional Commissioners are essentially the same as those exercised by an administrative agency reviewing the initial decision of a hearing examiner, where "the agency has all the powers which it would have in making the initial decision * * *." 5 U.S.C. 557 (b); see Davis, *Administrative Law Text*, § 10.05, p. 222 (1972); *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492; *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364. Thus, petitioner received from the Regional Commissioner the decision to which it was entitled.

5. Petitioner Asai contends (Pet. 32-38) that she was denied due process because the immigration judge found that she was deportable without giving her a hearing on her application for an extension of her visitor's visa. She urges that under *The Japanese Immigrant Case*, 189 U.S. 86, 100-101, due process requires that an alien who has entered the country must be given an "opportunity to be heard upon the questions involving his right to be and remain in the United States" before he is deported.

But, as the court of appeals pointed out (Pet. App. 17a), although the District Director's refusal to extend Asai's visa was not subject to review in the deportation hearing, it was subject to review in the district court.[7] Asai had the opportunity to present to the district court any evidence that the District Director's failure to extend her visa was arbitrary, capricious, or otherwise not in accord with law. Especially since the granting of an extension is a decision committed to executive discretion, this opportunity satisfied her claim to due process (Pet. App. 17a). Asai cannot now complain that the immigration judge gave conclusive effect to the District Director's decision, since she did not avail herself of her right to challenge that decision.[8]

[7] Petitioners suggest (Pet. 33 n. 13) that the court of appeals erred in concluding that the District Director's decision was subject to review under the Administrative Procedure Act. They cite *Califano* v. *Sanders*, 430 U.S. 99, which holds that the A.P.A. is not an independent grant of subject matter jurisdiction. But the court of appeals correctly looked to the A.P.A. for the standard of review; jurisdiction would be invoked under Section 279 of the Immigration and Nationality Act, 8 U.S.C. 1329. See *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 210; *Ibrahim* v. *Kiley*, 420 F. Supp. 13, 15 (S.D.N.Y.); *Fiallo* v. *Levi*, 406 F. Supp. 162, 165 (E.D.N.Y.), affirmed *sub nom. Fiallo* v. *Bell*, 430 U.S. 787.

[8] Asai's reliance (Pet. 34-35) on *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, is misplaced. In *Ashbacker*, although the right to a hearing on a license application had been preserved in form, it had been rendered a nullity by the Commission's previous decision to award the license to another applicant. Here the opportunity to be heard is not a nullity; there is simply a bifurcated system, channelling review of the District Director's decision to the district court, while the decision on deportability is made by the immigration judge subject to review in the court of appeals.

Asai argues (Pet. 38) that these procedures result in an undesirable two-step review process that "invites a proliferation of litigation * * *." She may be correct, but that does not establish a denial of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
DAVID B. SMITH,
Attorneys.

AUGUST 1978.

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